TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 36

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1935
CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2980.

THOMAS W. WHITE,

Former Collector of Internal Revenue,

DEFENDANT, APPELLANT,

v.

MARY ADELAIDE POOR ET AL.,

Surviving Executors.

PLAINTIFFS, APPELLEES.

APPEAL FROM THE DISTRICT COURT O E UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (BREWSTER, J.), OCTOBER 25, 1934.

TRANSCRIPT OF RECORD.

FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,

J. DUKE SMITH,
SPECIAL ASSISTANT TO THE U. S. ATTORNEY,
for Appellant.

EDWIN A. HOWES,
HUTCHINS & WHEELER,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2980.

THOMAS W. WHITE, Former Collector,

DEFENDANT, APPELLANT,

v.

MARY ADELAIDE POOR ET AL.,

Surviving Executors.

PLAINTIFFS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 5625, Law Docket.

MARY ADELAIDE POOR AND GEORGE WINTHROP SARGENT,

Surviving Executors of the Will of Adelaide J. Sargent, Deceased,

Plaintiffs.

v.

THOMAS W. WHITE,

Former Collector of Internal Revenue,

Defendant.

The writ and declaration in this cause were filed in the clerk's office on the tenth day of July, A.D. 1933, and are in the words and figures following:

WRIT.

MASSACHUSETTS DISTRICT, ss.:

[L. S.]

The President of the United States of America,

To the Marshal of our District of Massachusetts, or his Deputy,

GREETING:

We command you to attach the goods or estate of Thomas W. White, Collector of Internal Revenue, of Newton in our District of Massachusetts, defendant, to the value of Five Thousand (5,000) Dollars, and summon the said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September, 1933, then and there, in our said Court, to answer unto Mary Adelaide Poor of Cambridge and George Winthrop Sargent of Wellesley, both in said District of Massachusetts, surviving executors of the will of Adelaide J. Sargent, deceased, late of Boston in said District, plaintiffs, in an action of contract. To the damage of the said plaintiffs (as they say) the sum of Five Thousand Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

WITNESS, The Honorable James A. Lowell, at Boston, the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-three.

JAMES S. ALLEN, Clerk,
by John E. Gilman, Jr., Deputy Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA
MASSACHUSETTS DISTRICT } ss: Boston, June 20, 1933.

Pursuant hereunto I have this day attached a chip as the

property of the within named Thomas W. White, and thereafter on the same day I summoned the within named Thomas W. White, to appear at Court as within directed, by giving to him in hand at Boston, in said district an original Summons to this writ.

WILLIAM J. KEVILLE, U. S. Marshal,
by Joseph M. Winston, Deputy.

DECLARATION.

[Filed July 10, 1933.]

Upon the filing of the writ and declaration herein, an order to plead was entered.

COUNT 1. The plaintiffs say that: They are the duly appointed surviving executors of the will of Adelaide J. Sargent. Said Adelaide J. Sargent died on January 22, 1931, a resident of Boston, Massachusetts, leaving a last will and testament. Said will was duly proved and allowed in the Probate Court of Suffolk County, Massachusetts, on February 19, 1931, and the plaintiffs together with Arthur H. Sargent were appointed and duly qualified as executors on February 19, 1931. Said Arthur H. Sargent died on March 20, 1932, and the plaintiffs since March 20, 1932, have been and now are the surviving executors of the will of said Adelaide J. Sargent.

On January 20, 1932, said executors duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal Estate Tax Return for the estate of said Adelaide J. Sargent, showing a gross estate of $53,384.37, allowable deductions amounting to $6,539.82, a specific exemption of $100,000 and no net estate. Said $53,384.37 was the correct value of all the property owned and possessed by said Adelaide J. Sargent at the time of her death, said deductions in the amount of $6,539.82 were allowable deductions to which the executors were entitled and said specific exemption of $100,000 was an allowable exemption to which said executors were entitled.

On a review and audit of said Estate Tax return the Com-

missioner of Internal Revenue, erroneously and without authority of law and against the protest of said executors, determined the value of the gross estate of said Adelaide J. Sargent to be $491,275.79, by adding to said value of the estate owned and possessed by her at the time of her death, $437,891.42 which represented the value of the property of the Sargent Trust, which trust was created by said Adelaide J. Sargent on December 31, 1919, by conveyance of certain real estate then owned by her, to herself and two other persons as trustees upon a trust set forth in a declaration of trust executed on December 31, 1919, by said three trustees. Said conveyance in trust by said Adelaide J. Sargent was not made in contemplation of death and was not a transfer to take effect in possession and enjoyment at or after the death of said Adelaide J. Sargent, but was a complete and unconditional transfer by her of all her right, title and interest in said property. No power to revoke, alter or amend said trust was given or reserved to said Adelaide J. Sargent. The only power to revoke, alter or amend said trust was a power given to the trustees for the time being to revoke said trust in whole or in part. Said Adelaide J. Sargent had no power to change the trustees or to designate new trustees in case of resignation or death of the original trustees. At all times prior to the death of said Adelaide J. Sargent, her son Arthur H. Sargent, who had a substantial beneficial interest under said trust, and Harry LeBaron Sampson, who had no beneficial interest, were two of the three trustees. Said Arthur H. Sargent's beneficial interest was at all times adverse to the termination or revocation of said trust and said Sampson was at all times unwilling to revoke said trust without the consent of all of the children of said Adelaide J. Sargent, all of whom were beneficially interested in said trust, and said children were at all times unwilling to consent to a revocation of said trust. Said power to revoke said trust was never exercised by said trustees and said trust was in full force and effect at the date of the death of said Adelaide J. Sargent.

The true value of said property of said Sargent Trust at the time of the death of said Adelaide J. Sargent was $437,891.42. On said review and audit of said estate tax return the Commissioner of Internal Revenue determined that said deductions in the amount of $6,539.82 were allowable deductions and that said exemption of $100,000. was an allowable exemption and against the protest of said executors determined that the value of the net estate of said Adelaide J. Sargent was $385,485.97 and assessed a deficiency estate tax in the amount of $2,377.89, stating as his reason therefor that the transfer of the Sargent Trust was taxable under and by virtue of the provisions of Section 302 (d) of the Revenue Act of 1926. Subsequent thereto under date of March 16, 1933, the plaintiffs received from the defendant a notice and demand for the payment of said $2,377.89 together with interest thereon in the amount of $155.57, said assessment and interest totaling $2,533.46.

On or about April 12, 1933, in consequence of and by compulsion of said notice and demand, the plaintiffs paid to the defendant as Collector of Internal Revenue said $2,533.46 under written protest expressly reserving the right to sue for and recover said amount together with interest thereon from the time of payment. Said payment was not made voluntarily, but was made under compulsion of said notice and demand and solely to avoid the pains and penalties for failure to pay.

On or about April 26, 1933, the plaintiffs duly filed with the Commission of Internal Revenue, a claim for refund of said payment of $2,533.46 stating as reasons therefor (1) that the Commissioner had erroneously included the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent and that the whole amount of the tax was due to such inclusion; (2) That under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of said Sargent Trust ought not to have been included as part of the gross estate

of Adelaide J. Sargent and no part of said tax ought to have been assessed; (3) That the Revenue Act of 1926 as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is, in that respect, in violation of the Constitution of the United States and the Amendments thereof, and is void.

Said claim for refund was rejected by the Commissioner of Internal Revenue and the plaintiffs received notice by letter signed by the Acting Commissioner of Internal Revenue under date of June 1, 1933, that said claim for refund was rejected in its entirety.

Wherefore the plaintiffs say that the entire amount of said deficiency assessment is due to the erroneous inclusion of the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent; that without said erroneous inclusion of the value of said trust property the gross estate of said Adelaide J. Sargent is less than the total of allowable deductions and the allowable specific exemption; that the Commissioner of Internal Revenue was in error in treating the value of the property of said Sargent Trust as a part of the gross estate of said Adelaide J. Sargent and in determining an estate tax on the basis of a gross estate determined by him as including the value of said trust property or any part thereof; that no estate tax was properly assessable upon them with respect to the estate of Adelaide J. Sargent; that under the law and the Constitution of the United States and Amendments thereof no estate tax could properly be assessed upon the plaintiffs with respect to the transfer of said trust property or any interest therein, or by reason of the death of said Adelaide J. Sargent; that the rejection of said claim for refund was error of law; that said tax was assessed upon the plaintiffs illegally and without authority of law and was collected from the plaintiffs by the defendant illegally, wrongfully and without authority of law,

and the defendant owes the plaintiffs $2,533.46 together with interest thereon from April 12, 1933.

HUTCHINS & WHEELER,
By their Attorneys,
HARRY LEBARON SAMPSON,
EDWIN A. HOWES.

On the 24th day of July, A.D. 1933, the following answer was filed:

ANSWER.

[Filed July 24, 1933.]

Now comes the defendant in the above-entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorneys,
FREDERICK H. TARR,
United States Attorney,

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued to the September Term, A.D. 1933, when, to wit, December 1, 1933, the following waiver of jury was filed.

WAIVER OF JURY.

[Filed December 1, 1933.]

Now come the parties and waive trial by jury, by their attorneys.

HUTCHINS & WHEELER,
HARRY LEBARON SAMPSON,
EDWIN A. HOWES,
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.
Attorney for the Defendant.

This cause was thence continued to the December Term, A.D. 1933, when, to wit, January 3, 1934, the following statement of agreed facts was filed.

STATEMENT OF AGREED FACTS.

[Filed January 3, 1934.]

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The plaintiffs, Mary Adelaide Poor and George Winthrop Sargent, are the duly appointed surviving executors of the will of Adelaide J. Sargent, deceased, late of Boston, Massachusetts. Adelaide J. Sargent died on January 22, 1931. At the time of her death she was 93 years of age, a resident of Boston in the County of Suffolk, Commonwealth of Massachusetts, and was a citizen of the United States of America. The last will of Adelaide J. Sargent, dated April 25, 1930, was duly proved and allowed in the Probate Court of Suffolk County on February 19, 1931, and the plaintiffs, Mary

Adelaide Poor and George Winthrop Sargent, together with Arthur H. Sargent, were appointed and duly qualified as executors of her last will on February 19, 1931. A true and complete copy of the decedent's last will, marked Exhibit "A", is annexed hereto and made a part hereof, and may be used in evidence for all purposes for which the original will might properly be used. Arthur H. Sargent died on March 20, 1932, and since that date the plaintiffs, Mary Adelaide Poor and George Winthrop Sargent, have been, and they now are, the surviving executors of the last will of Adelaide J. Sargent.

2. On January 20, 1932, the executors duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal estate tax return for the estate of Adelaide J. Sargent. The return showed a gross estate of the value of $53,384.37, allowable deductions amounting to $6,539.82, a specific exemption of $100,000.00, and no net estate. On the return the executors set forth information relative to the terms of a conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent, who was her son, and Harry LeBaron Sampson, relative to the property held by the trustees under the trust at the date of the death of Adelaide J. Sargent and relative to the value of said trust property at said date. A true and complete copy of the return, marked Exhibit "B", is annexed hereto and made a part hereof, and may be used in evidence for all purposes for which the original return might properly be used.

3. The terms of the trust are as set forth in a declaration of trust executed on December 31, 1919. A true and complete copy of the declaration of trust, marked Exhibit "C", is annexed hereto and made a part hereof, and the terms and conditions of the trust as set forth in such copy and said Exhibit "C" may be used in evidence for all purposes for which the original declaration of trust might properly be used.

4. Most of the property included in the conveyance in trust came to Adelaide J. Sargent either directly from her husband, George D. Sargent, who died prior to the creation

of the trust, or from reinvestment of the proceeds of sales of property received from him. George D. Sargent was the father of the three children of Adelaide J. Sargent who are named in the declaration of trust as beneficiaries of said trust.

5. On a review and audit of the estate tax return the Commissioner of Internal Revenue, against the protest of the executors included as part of the gross estate of Adelaide J. Sargent the value of the trust property and determined the total value of the gross estate to be $491,275.79, instead of $53,384.37, returned by the executors. Deducting from the gross estate so determined the allowable personal exemption and deductions, the Commissioner determined the value of the net estate to be $384,735.97, determined the gross estate tax liability to be $11,889.44, and, after allowance of a credit of $9,511.55 for inheritance and estate taxes paid to the Commonwealth of Massachusetts, assessed a deficiency estate tax in the sum of $2,377.89. Copies of the Commissioner's determination of the Federal estate tax liability assessed against the estate of Adelaide J. Sargent and mailed to the plaintiffs on October 27, 1932, and February 23, 1933, respectively, marked Exhibits "D" and "E", are annexed hereto and made a part hereof, and said copies and Exhibits "D" and "E" may be used in evidence for all purposes for which the originals thereof might properly be used.

6. March 16, 1933, the plaintiffs received from the defendant a notice and demand for payment of the deficiency assessment of $2,377.89, together with interest thereon amounting to $155.57.

7. On April 12, 1933, the plaintiffs in pursuance of such notice and demand paid to the defendant as Collector of Internal Revenue the deficiency assessment and interest totaling $2,533.46, under written protest that the payment was not made voluntarily but under the compulsion of said notice and demand and to avoid the pains and penalties for failure to pay.

8. On April 26, 1933, the plaintiffs filed with the Commissioner of Internal Revenue a claim for refund of the payment of $2,533.46, stating as reasons therefor (1) that the Commissioner had erroneously included the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent and that the whole amount of the tax was due to such inclusion; (2) that under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of said Sargent Trust ought not to have been included as part of the gross estate of Adelaide J. Sargent and no part of said tax ought to have been assessed; (3) that the Revenue Act of 1926, as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is in that respect in violation of the Constitution of the United States and the Amendments thereof and is void. A copy of the claim for refund, marked Exhibit "F", is annexed hereto and made a part hereof, and said copy and Exhibit "F" may be used in evidence for all purposes for which the original thereof might properly be used.

9. The claim for refund was rejected in its entirety by the Commissioner of Internal Revenue on or about June 1, 1933, and the plaintiffs received notice, by letter signed by the Acting Commissioner of Internal Revenue under date of June 1, 1933, that said claim for refund was rejected in its entirety. A copy of the letter of June 1, 1933, marked Exhibit "G", is annexed hereto and made a part hereof, and said letter and Exhibit "G" may be used in evidence for all purposes for which the original thereof might properly be used.

10. The actual value of the gross estate of Adelaide J. Sargent at the date of her death, exclusive of the value of the property then held by the trustees under said Sargent Trust was $53,384.37, as returned by the executors and as determined by the Commissioner of Internal Revenue upon review and audit of the Estate Tax return, and the total of allowable

deductions from her gross estate, including the specific exemption of $100,000.00, amounted to $106,539.82, irrespective of whether or not the value of said trust property was or ought to have been included as part of her gross estate. The estate is entitled to a specific exemption of $100,000.00, irrespective of whether or not the value of said trust property was or ought to have been included as part of her gross estate.

HUTCHINS & WHEELER
HARRY LEBARON SAMPSON
EDWIN A. HOWES
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD
United States Attorney.
By: J. DUKE SMITH,
Special Asst. to the U. S. Attorney
Attorney for defendant.

[MEMORANDUM. Copies of exhibits, the last will of decedent and copy of Federal estate tax return, marked respectively "A" and "B" are here omitted, by consent of counsel.

JAMES S. ALLEN, *Clerk.*]

EXHIBIT "C"

ANNEXED TO STATEMENT OF AGREED FACTS.

THE SARGENT TRUST.

THIS DECLARATION OF TRUST made this thirty-first day of December, A. D. 1919,

WITNESSETH:

THAT WHEREAS Adelaide J. Sargent of Hamilton in the County of Essex and Commonwealth of Massachusetts, has by deed of even date with this declaration of trust and to be recorded herewith, conveyed to the said Adelaide J. Sargent, Arthur Hewes Sargent of Boston in the County of Suffolk, and Harry LeBaron Sampson of Middleborough in the County of Plymouth, Trustees under this declaration of trust, cer-

tain parcels of real estate more specifically described in said deed,

NOW THEREFORE, We, the said Adelaide J. Sargent, Arthur Hewes Sargent and Harry LeBaron Sampson, do hereby declare that we hold the said property and any and all property that we may hereafter hold in place of or in substitution for or in addition to the property conveyed to us by said deed, in trust, to hold, manage, invest and reinvest the same as a trust fund, changing investments from time to time as we shall see fit, and after deducting all proper charges and expenses, including a reasonable compensation for our services, and also such amounts as we may deem reasonable to provide a reserve fund for repairs, taxes and other expenses that may be payable thereafter, to dispose of the same in the manner herein set forth, namely;

FIRST. The net income of said trust fund shall be disposed of as follows:

During the lifetime of the said Adelaide J. Sargent, one-half thereof shall be paid to her in semi-annual payments, or oftener if convenient, and the other half thereof and after the death of the said Adelaide J. Sargent the whole of said net income, shall be equally divided between such of the three children of the said Adelaide J. Sargent, to wit, the said Arthur Hewes Sargent, George Winthrop Sargent of Wellesley in the County of Norfolk, and Mary Adelaide Poor, wife of Clarence H. Poor, of Beverly, in the County of Essex, as shall be living at the time of such payment and the issue then living taking by right of representation of such of them as shall have died at the time of such payment, subject, however, to the following power of appointment: that any one of said children so dying may by his or her last will direct and appoint that the share of the income which but for his or her death would be paid to him or her, or any part thereof, shall be paid to any other person, and if such appointment be made the share of income or any part thereof shall be paid over in accordance therewith.

Upon the death of the last survivor of Adelaide J. Sargent and said children this trust shall terminate, and upon such termination the capital of said trust shall be divided into three equal shares, except as hereinafter provided, and one such share shall be paid over to such person or persons and for such uses and purposes as the said Arthur Hewes Sargent shall by his last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said Arthur Hewes Sargent who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be entitled to receive the same and in the proportions in which they would be entitled to receive it had the said Arthur Hewes Sargent then died intestate a resident of Massachusetts, seized and possessed of said property; and one such share shall be paid over to such person or persons and for such uses and purposes as the said George Winthrop Sargent shall by his last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said George Winthrop Sargent who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be entitled to receive the same and in the proportions in which they would be entitled to receive it had the said George Winthrop Sargent then died intestate a resident of Massachusetts, seized and possessed of said property; and the remaining share shall be paid over to such person or persons and for such uses and purposes as the said Mary Adelaide Poor shall by her last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said Mary Adelaide Poor who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be en-

titled to receive the same and in the proportions in which they would be entitled to receive it had the said Mary Adelaide Poor then died intestate a resident of Massachusetts, seized and possessed of said property.

If at any time the amount of income paid to any of said children from the trust fund shall not in the opinion of the trustees under this declaration of trust be sufficient for his or her comfortable support and maintenance and that of his or her family, the trustees may from the capital of the trust fund in their hands pay to him or her such sum of money as they shall see fit, but not to exceed in any year the sum of four thousand dollars ($4000) to any one child, and thereafter the interest of the child to whom such payment is made, his or her issue, and the legatees and appointees under his or her will, in the income of the said trust fund and in the principal thereof shall be diminished in such manner and to such extent as the trustees shall in their uncontrolled discretion determine.

SECOND. The trustees shall have the absolute control over and disposal of all property, real or personal, held by them at any time under this trust, as if they were the sole beneficial owners thereof, including but not hereby restricting the preceding generality, the power to sell for cash or credit, at public or private sale, free and discharged of all trusts, to pledge or mortgage the trust property, with or without power of sale (and no pledgee, purchaser or mortgagee shall be liable to see to the application of the money paid or lent to the trustees). They shall also have the power to borrow money for the purposes of the trust, and give notes therefor binding the assets of the trust but not the trustees personally, and no lender of money to said trustees shall be liable in any way for the application of the money lent. The trustees may make party wall or other contracts or agreements in relation to the trust estate and may make leases of the trust property for such terms as said trustees may deem expedient irrespective of the duration of the trust and all persons receiving

said property under the provisions hereof shall take the same subject to such leases or agreements. Said trustees may repair, alter or rebuild the structures on the property held hereunder or erect new buildings thereon, and may invest the proceeds of property sold, or the proceeds of mortgage loans in other real or personal property to be held upon the trusts hereof.

In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed and acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

THIRD. No bond shall be required of any trustee under this declaration of trust, and each trustee shall be responsible only for his own acts and defaults and not for the acts and defaults of any other, and no trustee shall be liable for any banker or broker or agent by him employed, and in the investment of the trust funds they shall have full and uncontrolled discretion and shall not be responsible for any losses incurred by reason of their investments, and they shall not be liable for any diminution in value or loss of any part of the trust fund unless occasioned by their gross neglect or wilful default.

FOURTH. Whenever in the execution of the trusts under this declaration of trust it shall be necessary to separate any part of the capital from the remainder thereof, or to distribute the whole or any part of the capital of said trust fund, the trustees shall have power to make a valuation of the whole capital of the trust fund then existing and select such and so much thereof as in their opinion would be just and equitable as the share of the person to whom any part

thereof is to be paid or distributed, and in making such valuation and selection the decision of the trustees shall be final and binding upon the parties.

FIFTH. The trustees are authorized to pay over any and all dividends, interest and income of the said trust fund to the various beneficiaries at their discretion without regard to the question whether the same are derived from wasting investments or not and without making any reserve therefrom for the purpose of making good to the capital the amount paid in premiums on bonds purchased or the excess above their par value at which such securities may be at any time valued.

SIXTH. The interest of the beneficiaries under this declaration of trust shall be free from anticipation, alienation, assignment or pledge by them and free from attachment or control by their creditors by any proceedings at law or in equity.

SEVENTH. In case of the death, resignation or inability to act of any of the trustees under this declaration of trust, a successor shall be appointed by the surviving trustee or trustees by a written instrument duly signed, sealed and acknowledged by them or him and approved by the then living children of said Adelaide J. Sargent and duly recorded in the Registry of Deeds for the County of Suffolk, and if no such appointment shall be made within ninety days after such death, resignation or inability to act of any of said trustees, then by a Judge of Probate for the County of Suffolk and Commonwealth of Massachusetts upon the application of any person interested hereunder, subject, however, to this provision: that there shall be at all times one trustee under this declaration of trust who shall not be related either by blood or marriage to any of the beneficiaries hereunder. Until the appointment of a succeeding trustee or trustees the surviving or continuing trustee or trustees shall have all the rights and powers given to the trustees hereunder, and in case of the appointment of a succeeding trustee or trustees

the person or persons so appointed shall have the like duties, power and discretion as are herein given or imposed upon the trustees herein appointed.

EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation.

NINTH. The certificate of the remaining trustees as to the death or inability to act of any trustee hereunder and of the trustees for the time being as to the relationship of any person by blood or marriage to any of the beneficiaries and as to any other facts or matters in any way relating to the trust, when signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, shall be conclusive as to all facts stated in such certificate.

IN WITNESS WHEREOF we, said Adelaide J. Sargent, Arthur Hewes Sargent and Harry LeBaron Sampson, have

hereunto set our hands and seals the day and year first above written.

ADELAIDE J. SARGENT (seal)
ARTHUR H. SARGENT "
HARRY LEBARON SAMPSON "

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. December 31st. 1919.

Then personally appeared the above-named Adelaide J. Sargent and Harry LeBaron Sampson and acknowledged the foregoing instrument to be their free act and deed, before me,

WALTER L. VAN KLEECK
Justice of the Peace

My commission expires April 2, 1920.

EXHIBIT "D"

ANNEXED TO STATEMENT OF AGREED FACTS.

Oct 27 1932

MT-ET-C1-9452-LO
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931

Assess Dtf. Tax $2377.89
Assess Int. 6% from 1/22/32 to d/a
By VD Date 2/10/33
Page..... Line..... List.....

George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins & Wheeler,
49 Federal Street,
Boston, Massachusetts.

Sirs:

The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of June 4, 1932. The deficiency in Federal estate tax hereby determined amounts to $9,908.54, and is fully explained in the attached statement, consisting of two pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form

of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

DAVID BURNET, Commissioner.

By: R. M. ESTES,
Deputy Commissioner.

Enclosures:
Statement.
Waiver – Form 890.
HTD
LO WJH
MT-ET-C1-9452-LO-Massachusetts
Estate of Adelaide J. Sargent

The protest relates to the following items:

	Returned	Tentatively Determined	Determined
GROSS ESTATE			
Transfers			
Property transferred under trust agreement dated December 31, 1919	$ 0.00	$437,891.42	$437,891.42
DEDUCTIONS			
Attorneys' fees	$ 750.00	$ 0.00	$ 750.00

It is contended by the estate that the inclusion of trust property of the Sargent Trust as part of the gross estate of the decedent is contrary to the principles laid down by the Supreme Court in certain cases which are cited and is squarely in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of White v. Erskine.

After careful consideration of these citations in their relation to the transfer in the instant case, the Bureau is of the opinion that the transfer of the Sargent Trust is taxable under and by virtue of the provisions of Section 302 (d) of the Revenue Act of 1926.

Under "Attorneys' Fees", deduction is made in the amount

which will be paid as disclosed by evidence submitted in support of the protest.

In view of the foregoing, the following computation shows the estate tax liability of this estate, which is hereby made final:

Gross estate	$ 53,384.37	$491,275.79	$491,275.79
Deductions	106,539.82	105,789.82	106,539.82
Net estate	$ 0.00	$385,485.97	$384,735.97
Gross tax	$ 0.00	$ 11,919.44	$ 11,889.44 ✓
Credit for State estate, inheritance, legacy or succession taxes paid	0.00	0.00	1,980.90 ✓
Net tax	$ 0.00	$ 11,919.44	$ 9,908.54 ✓
Deficiency			$ 9,908.54

Credit is allowed in the amount of estate, inheritance, legacy, or succession taxes paid to the State of Massachusetts, being "$669.34 on estate" and "$1,311.56 on declaration of trust."

MT-ET-C1-9452-LO-Massachusetts
Estate of Adelaide J. Sargent

Upon receipt of a waiver or upon the expiration of sixty days from the date of this letter if a petition is not filed with the Board of Tax Appeals, $2,377.89 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State or Territorial estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of the Estate Tax Regulations. If, after a reasonable time, the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected. The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT "E"

ANNEXED TO STATEMENT OF AGREED FACTS.

Feb 23 '33

MT-ET-C1-9452-RB
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931
George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins & Wheeler, Attorneys,
49 Federal Street,
Boston, Massachusetts.

Sirs:

Reference is made to Bureau letter addressed to you under date of October 27, 1932, indicating a deficiency of $9,908.54 in connection with the above-named estate.

Since the mailing of the letter the estate has submitted the evidence required under Article 9 of Regulations 70 (1929 Edition) which entitles it to credit in the amount allowed as indicated in the following tabulation:

Gross tax determined	$ 11,889.44
Credit for State estate, inheritance, legacy or succession taxes paid	9,511.55
Net tax determined	$ 2,377.89

Inasmuch as the tax due has been assessed, the records of the Bureau pertaining to the case will be closed upon receipt of notice from the Collector that full payment of all tax and interest has been made.

Respectfully,
DAVID BURNET, Commissioner.
By: R. M. ESTES,
Deputy Commissioner.

LM

EXHIBITS "F" & "G"

ANNEXED TO STATEMENT OF AGREED FACTS.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

#1289 Posted

CLAIM

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes)

Collector's Stamp
(Date received)
Apr 26 1933
District of Mass.
Estate Tax Division

State of Massachusetts } ss:
County of Suffolk }

TYPE OR PRINT

Name of taxpayer or purchaser of stamps Mary Adelaide Poor and George Winthrop Sargent, Surviving Executors of the will of Adelaide J. Sargent,

Business address c/o Hutchins & Wheeler, 49 Federal St. Boston, Mass.

Residence Cambridge and Wellesley, Mass.

The deponents, being duly sworn according to law, depose and say that this statement is made on behalf of the taxpayers named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Massachusetts

2. Period (if for income tax, make separate form for each taxable year) from ....., 19...., to ....., 19....

3. Character of assessment or tax Estate Tax deficiency assessment

4. Amount of assessment, $2533.46; dates of payment April 11, 1933

5. Date stamps were purchased from the Government

6. Amount to be refunded $2,533.46

7. Amount to be abated (not applicable to income or estate taxes) $

8. The time within which this claim may be legally filed expires, under Section 319 (b) of the Revenue Act of 1926, on April 11th, 1936.

The deponent verily believes that this claim should be allowed for the following reasons:

by GEORGE WINTHROP SARGENT
by MARY ADELAIDE POOR

Signed GEORGE WINTHROP SARGENT
MARY ADELAIDE POOR
Surviving Executors of the will
of Adelaide J. Sargent.

Sworn to and subscribed before me this 24th day of April, 1933

G. S. HOWARD,
Notary Public
K1

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered, Estate Tax; List, F23a; Year, 1933; Month, Feb.; Account No. or page 102, Line 1; Amount assessed, $2533.46; Paid, Abated, or Credited—Date, 4/11/33, Amount, $2533.46; Pd. Ab. Cr.—Pd.

Total amount assessed, $2533.46; total Paid, $2533.46.

P. M. WHITE,
Collector of Internal Revenue.
(District) Mass.

Claim examined by—
AMB
Claim approved by—
[Name illegible], Chief of Division.
5/26/33

COMMITTEE ON CLAIMS

Amount claimed $2533.46
Amount allowed
Amount rejected $2533.46

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a state-

ment is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

K2

1. Because in determining the amount of gross and net estate for the purpose of the Federal Estate Tax, the Commissioner of Internal Revenue has erroneously included the value of the property of the Sargent Trust as part of the gross estate of Adelaide J. Sargent, and the whole amount of the tax is due to such inclusion.

2. Because under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of the Sargent Trust should not have been included as a part of the gross estate of Adelaide J. Sargent and no part of said tax should have been assessed.

3. Because the Revenue Act of 1926 as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is, in that respect, in violation of the Constitution of the United States and the Amendments thereof, and is void.

The terms of the Sargent Trust and a more detailed statement of the reasons for the allowance of this claim are set forth in the statement hereto annexed and made a part hereof.

STATEMENT OF TERMS OF THE SARGENT TRUST AND REASONS FOR CLAIM FOR REFUND OF TAX.

The said Sargent Trust was created by said Adelaide J. Sargent on December 31, 1919. By its terms the trust property which was conveyed by her to the trustees was to be held in trust during the joint lives of herself and her three children, Arthur H. Sargent, George Winthrop Sargent and Mary

Adelaide Poor, and the life of the survivor. During the life of said Adelaide J. Sargent one-half of the income was to be paid to her and one-sixth was to be paid to each of her three children and their respective issue or appointees by their respective wills. After the death of said Adelaide one-third of the income is to be paid to each of her children and their respective issue or appointees. On the death of the last survivor of said Adelaide and her three children the trust is to terminate and the principal is then to be divided among the issue or appointees of the three children. The three trustees were originally as follows: Adelaide J. Sargent, Arthur Hewes Sargent, who was a son of Adelaide and was entitled to a share of the income and had a power to appoint his share of the income and a share of the principal of the trust, and Harry LeBaron Sampson, who is not related to said Adelaide and has no beneficial interest in either the income or principal of the trust.

No power to revoke or change the trust was reserved to Adelaide J. Sargent as donor. The trustees under the trust for the time being were given the right to terminate the trust as to the whole or any part of the trust property, such termination to be effected only by a written declaration signed by all the persons who are trustees at the time of such termination. Adelaide J. Sargent retained no power to change the trustees or to designate new trustees. In the event of the death or resignation of a trustee a successor was to be appointed by the surviving or remaining trustees or trustee with the approval of the then living children of Adelaide. Adelaide's approval of the appointment of such new trustee was not required.

Adelaide J. Sargent was a trustee from the beginning of the trust until November 9, 1920, when she resigned. Her daughter Mary Adelaide Poor, one of the beneficiaries, was then appointed trustee and served until November 9, 1921, when she resigned. Adelaide J. Sargent was then reappointed, with the approval of the three children, to fill the

vacancy and thereafter served as one of the trustees until her death on January 22, 1931. Arthur H. Sargent, who was one of the beneficiaries, and Harry LeBaron Sampson were the other two trustees from the beginning of the trust until after the date of Adelaide's death. Adelaide J. Sargent at times expressed dissatisfaction with the trust and a desire to terminate it, but the other trustees were at all times unwilling to terminate and no such termination took place.

The property included in the trust had come to Adelaide from her husband, George D. Sargent, who died prior to the creation of the trust. He was the father of the three other beneficiaries.

The executors of the will of Adelaide J. Sargent filed an estate tax return showing a gross estate of $53,384.37, deductions amounting to $106,539.82, no net estate and no tax. This return gave full information as to the Sargent Trust, but did not include the value of the trust property in the gross estate of the decedent.

The Commissioner of Internal Revenue determined that the value of the Sargent Trust property as above stated, namely, $437,891.42, was taxable as part of the estate of Adelaide J. Sargent and included said amount in the decedent's gross estate, stating in his tentative determination as the reason for such inclusion "that the trust was subject to termination with the consent of less than all of the beneficiaries." Under date of February 23, 1933, the Commissioner of Internal Revenue notified the executors of his final determination of a net tax in the amount of $2,377.89 based upon a gross estate of $491,275.79 which included the said value of the trust property. Under date of March 16, 1933, notice and demand for payment of said $2,377.89 together with $155.57 of interest was sent by the Collector of Internal Revenue at Boston, Massachusetts, to the executors. On April 11, 1933, the surviving executors paid said assessment to the said Collector of Internal Revenue under written protest.

The surviving executors contend that the inclusion of the

value of trust property of the Sargent Trust as part of the gross estate of the decedent and the consequent assessment of said deficiency tax is contrary to the principles laid down by the Supreme Court of the United States in construction of Section 302 (c) of the Revenue Acts of 1924 and of 1926, in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339; *May* v. *Heiner*, 281 U.S. 238; *Burnet* v. *Northern Trust Co.*, 283 U.S. 782; *McCormick* v. *Burnet*, 283 U.S. 784, and is squarely in conflict with the decision of the Circuit Court of Appeals for the First Circuit, in *White* v. *Erskine*, 47 Fed. (2d) 1014, in which case the Court ruled that, "It is only 'to the extent of the interest' of the decedent in the trust fund, and at his death, that subdivision (d) adds anything to the value of the gross estate," and that a power over the trust fund which the decedent could not exercise for her own benefit or for the benefit of her estate except with the consent of an adverse party such as one of the beneficiaries, or, as in the case then before the Court, with consent of the trustee was not an interest in the trust which added anything to the value of her gross estate.

The facts of *White* v. *Erskine* are closely paralleled by the facts relating to the Sargent Trust, a complete copy of which was filed with the Estate Tax return. The decedent's beneficial interest in the trust was merely the right to one-half the net income which accrued during her lifetime. This was all that was given or reserved to her at the creation of the trust.

The decedent's power as trustee, acting in conjunction with the other trustees, to terminate the trust during her lifetime, like the power of the settlor in *Erskine* v. *White*, was not, and could be, converted by her into a beneficial interest in the trust property because she could not exercise the power except by consent of the two other trustees one of whom was adversely interested both as trustee and as beneficiary and the other as trustee representing all the beneficiaries and therefore bound to take into consideration the interests of those beneficiaries who would have been damaged by a revocation

of the trust prior to Mrs. Sargent's death. In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, referring to a similar power the Supreme Court of the United States said, "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute."

The executors contend further that if and in so far as the Revenue Act of 1926 purports to confer authority upon the Commissioner of Internal Revenue to include the value of the property of the Sargent Trust in the gross estate of this decedent for the purposes of determining an estate tax with respect to the passing of her estate or the cessation of any power to make the trust property part of her estate it is unconstitutional and void and the collection of a tax so determined is a taking of property without due process of law.

cc – Harry LeBaron Sampson, Attorney,
49 Federal Street,
Boston, Massachusetts.

MT-ET-C1-9452-AWW
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931

Jun 1 1933

George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins and Wheeler,
49 Federal Street,
Boston, Massachusetts.

Sirs:

The Bureau has examined the claim filed by you on April 26, 1932, for the refund of $2,533.46, Federal estate tax paid under the Revenue Act of 1926. The claim is based on the contention that the value of the property transferred by the

decedent under a trust agreement dated December 31, 1919, should be excluded from his gross estate, and also that its inclusion for tax is unconstitutional and void.

Certain cases are cited in support of such contention. The powers reserved to the decedent in the case of White v. Erskine cited by you, were much more limited than in the case now under consideration, and much, if not all, of the reasoning has been overruled in subsequent decisions. The Bureau rules that the power reserved in the trustees, of whom decedent was one at the date of her death, brings this case under Section 302 (d) of the Revenue Act of 1926. In this connection, your attention is called to the decisions of the United States Supreme Court in Porter v. Commissioner, decided March 13, 1933, and Reinecke v. Smith, decided April 11, 1933, also to the decision of the United States Court of Claims in the case of Hoblitzelle v. United States, decided on May 16, 1933.

Therefore, without decision as to whether the trust comes under any other provision of the statute, it is held that the value of the property covered by this trust was properly included in the gross estate. As to the constitutional question raised by you, the function of the Bureau is to administer the Internal Revenue Acts, and all constitutional questions must be determined by the court.

– 2 –

MT-ET-C1-9452-AWW-Massachusetts
Estate of Adelaide J. Sargent

In view of the foregoing, the claim for refund of $2,533.46 is rejected in its entirety.

Respectfully,

C R Beldridge
Acting Commissioner

At the same term, to wit, January 12, 1934, the following supplemental stipulation as to facts was filed:

SUPPLEMENTAL STIPULATION AS TO FACTS.

[Filed January 12, 1934.]

It is hereby agreed by the parties hereto that the three orig-

inal trustees were said Adelaide J. Sargent, Arthur H. Sargent, who was a son of said Adelaide, and was one of the beneficiaries, and Harry LeBaron Sampson, who had no beneficial interest in the trust property. The only changes which occurred in the personnel of the trustees prior to the death of said Adelaide J. Sargent were her resignation as trustee on November 9, 1920, the appointment in the manner provided for in the trust instrument, of her daughter, Mary Adelaide Poor, also one of the beneficiaries, to fill the vacancy, the resignation of said Mary Adelaide Poor on November 9, 1921, and the appointment, in the manner provided for in the trust instrument, of said Adelaide J. Sargent as trustee on said date. Said Arthur H. Sargent and Harry LeBaron Sampson continued as trustees throughout the whole of the period from the beginning of the trust until after the death of Adelaide J. Sargent. Said Adelaide J. Sargent was one of the trustees at her death. Said trust has never been terminated either in whole or in part. The value of the property held by the trustees of said trust was $437,891.42 at the date of said Adelaide J. Sargent's death.

HUTCHINS & WHEELER,
EDWIN S. HOWES,
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.
Attorneys for Defendant.

Also on the said 12th day of January, A.D. 1934, the following requests for rulings were filed by the plaintiffs and defendant:

DEFENDANT'S REQUESTS FOR RULINGS.

[Filed January 12, 1934.]

Now comes the defendant in the above-entitled action and requests that the Court find as matters of law:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

By his Attorneys,

FRANCIS J. W. FORD,

United States Attorney.

By: J. DUKE SMITH,

Special Assistant to the United States Attorney.

PLAINTIFFS' REQUESTS FOR RULINGS.

[Filed January 12, 1934.]

The plaintiffs request the following findings and rulings of law:

1. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was not made by her in contemplation of her death within the meaning of Section 402 (c) of the War Revenue Act of 1918, or within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. The evidence does not warrant a finding that the conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent trust was made by said Adelaide J. Sargent in contemplation of her death within the meaning of Section 402 (c) of the War Revenue Act of 1918 or within the meaning of Section 302 (c) of the Revenue Act of 1926.

3. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was not intended to take effect in possession or enjoyment at or after the death of said Adelaide J. Sargent within the meaning of

Section 402 (c) of the War Revenue Act of 1918 or within the meaning of Section 302 (c) of the Revenue Act of 1926.

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

6. The provision of Article Eighth of the Sargent Trust reading: "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder" and the accompanying provisions as to disposal of the property in case of such termination, did not reserve to or vest in Adelaide J. Sargent any such power or control over the trustees or over the property of the trust as to make the provisions of subdivisions (a) and (c) of Section 402 of the War Revenue Act of 1918 and Section 302 of the Revenue Act of 1926 applicable to the property of the trust or to the transfer.

7. The provision of Article Eighth of the Sargent Trust reading: "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder," and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or,

the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

HUTCHINS & WHEELER,
EDWIN A. HOWES.

Thereupon, to wit, January 12, 1934, said cause was set down for hearing on the statement of agreed facts and the supplemental stipulation as to facts, the Honorable Elisha H. Brewster, District Judge, sitting.

On the said 12th day of January, A.D. 1934, the following motion for entry of judgment was filed by the defendant:

DEFENDANT'S MOTION FOR JUDGMENT.

[Filed January 12, 1934.]

Now comes the defendant in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the defendant and against the plaintiffs with costs.

By his Attorneys,

FRANCIS J. W. FORD,

United States Attorney.

By: J. DUKE SMITH,

Special Assistant to the United States Attorney.

This cause was thence continued under advisement from term to term, when, to wit, August 7, 1934, said cause came on for further hearing, and it was ordered by the court that the defendant's requests for ruling be denied, the plaintiffs' requests for ruling be granted and the defendant's motion for judgment be denied, defendant's exceptions being saved.

On the said 7th day of August, 1934, an opinion of the court was announced, finding that the plaintiffs are entitled to recover the deficiency tax of $2533.46, unlawfully exacted, together with interest thereon, and it was ordered that judgment be entered accordingly.

Said cause was thence continued to the present September Term, A.D. 1934, when to wit, September 14, 1934, a draft bill of exceptions is filed by the defendant.

On the 25th day of October, A.D. 1934, a substituted bill of exceptions is filed by the defendant and allowed by the court.

Also on the said 25th day of October, the following plaintiffs' motion for entry of judgment is filed and allowed:

PLAINTIFF'S MOTION FOR JUDGMENT FORTHWITH.

[Filed and Allowed October 25, 1934.]

Now comes the plaintiffs in the above entitled action, after allowance of the defendant's bill of exceptions, and move that judgment for the plaintiffs be entered forthwith in the sum

of $2,533.46 together with interest thereon according to law from April 12, 1933 and costs.

By their Attorneys,
HUTCHINS & WHEELER,
EDWIN A. HOWES,

Oct. 25, 1934.
Allowed: S. H. B.,
D. J.

Thereupon to wit, October 25, 1934, it is considered by the Court, on the finding of the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Mary Adelaide Poor and George Winthrop Sargent, Executors, plaintiffs, recover of the said Thomas W. White, former Collector of Internal Revenue, defendant, the sum of two thousand five hundred thirty-three dollars and forty-six cents ($2533.46) damages, together with interest according to law from April 12, 1933, and their costs of suit taxed at.....

DEFENDANT'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed and Allowed October 25, 1934.]

This is an action at law by Mary Adelaide Poor and George Winthrop Sargent, surviving executors under the will of Adelaide J. Sargent, deceased, against Thomas W. White, former Collector of Internal Revenue for the District of Massachusetts to recover Federal estate taxes alleged to have been erroneously and illegally assessed and collected in the amount of $2,533.46 with interest from April 12, 1933. The pleadings and the written opinion of the District Court are a part of this record and may be referred to as part of this bill of exceptions. Trial by jury was waived by an agreement in writing signed by the parties. The case was tried before Brewster J. on January 10, 1934 on the pleadings, Statement of Agreed Facts, a supplemental stipulation and other evidence. The said Statement of Agreed Facts with Exhibits annexed thereto and said supplemental stipulation

are incorporated into and made a part of this bill of exceptions by reference. The other evidence, which consisted in part of oral testimony of witnesses and in part of written documents, so far as material to the questions raised by these exceptions was to the effect:—that in 1907 the decedent had conveyed substantially the same property in trust for the benefit of herself and her three children reserving a power of revocation; that this prior trust had been revoked in 1911 and another trust had been then created for the benefit of herself and her three children with a power of revocation reserved to herself, which trust also was revoked in 1919 at the time of creation of the trust which existed at the time of her death and which was created to take the place of the 1911 trust; that the purpose of the 1919 trust, which is the trust involved in this suit, was to more definitely fix the shares of the beneficiaries, to join as a trustee a person of independent judgment who was not a member of the family and not beneficially interested in the trust, and to eliminate the power of revocation which the decedent had under the former trust; that Harry LeBaron Sampson was made a trustee by the decedent with the approval of the decedent's three children; that he was unwilling to join in the exercise of the power to terminate the trust unless requested to do so by all the children of Mrs. Sargent; and that Arthur H. Sargent who was one of the three trustees and was also a beneficiary was in this country for two or three months at a time, sometimes for six or seven months, and the remainder of the time he was abroad. He was within the United States at the time of the decedent's death and for some months prior thereto. There was other evidence on the question of contemplation of death which is not herein set forth for the reason that the question whether or not the conveyance was in contemplation of death is not raised by this bill of exceptions. The above constitutes all the facts material to the issue raised by this bill of exceptions.

At the trial the defendant requested the court to find as matters of law the following:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

At the trial the defendant filed the following written motion for judgment:

Now comes the defendant in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the defendant and against the plaintiffs with costs.

At the trial the plaintiffs filed, among others, the following requests for findings and rulings:

. . . . . .

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

. . . . . .

7. The provision of Article Eighth of the Sargent

Trust reading "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder", and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

The trial was continued generally and on August 7, 1934,

during the course thereof the court denied the defendant's said request for rulings of law and his said motion for judgment and the defendant saved his exceptions. During the course of the trial the court granted all of the plaintiffs' said requests for rulings and the defendant saved his exceptions. On the same day the court handed down a written opinion in which it held that no portion of the value of the property in question was properly included in the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

The defendant, being aggrieved by the denial by the court of his said request for rulings of law and his said motion for judgment, and by the granting by the court of the plaintiffs' said requests for rulings of law and by the findings and rulings of the court, now excepts to said findings and rulings of the court, and therefore brings this bill of exceptions and prays that it may be allowed.

By his Attorneys,
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Assented to:
HUTCHINS & WHEELER,
EDWIN H. HOWES,
Attorneys for Plaintiffs.

Allowed Oct. 25, 1934:
ELISHA H. BREWSTER,
D. J.

From the judgment entered October 25, 1934, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the defendant on the said 25th day of October, and allowed by the court.

OPINION.

[Filed October 25, 1934.]

August 7, 1934.

BREWSTER, J. This action is brought to recover an alleged overassessment and overpayment of an estate tax assessed upon the transfer of the net estate of Adelaide J. Sargent, deceased. The controversy arises over the act of the Commissioner of Internal Revenue in including in the gross estate the value of certain property conveyed to trustees by the decedent. The case was heard upon an agreed statement of facts and evidence presented at the trial.

I find the facts to be as stipulated, and I further find from the evidence that the transfer was not made by the decedent in contemplation of death.

The pertinent facts may be stated as follows:

In 1907, the decedent conveyed certain property in trust, for the benefit of herself and her children. This trust was revoked in 1911, and another trust created which was also revoked in 1919. In both of the trust instruments the power of revocation was expressly reserved to the settlor. To take the place of the trust created in 1911, the decedent, on December 31, 1919, created the trust involved in the present suit. The purpose of this last trust was to more definitely fix the shares of the beneficiaries, to join as trustee a disinterested person with no beneficial interest, and to eliminate any reserved power of revocation so that the income would not be wholly taxed to the settlor.

The decedent, her son Arthur H. Sargent and Harry LeBaron Sampson were the trustees who joined in the declaration of trust, dated December 31, 1919, and on that date the decedent transferred to the trustees the real and personal property, the value of which the Commissioner included in the gross estate for the purpose of computing the estate tax.

At the time of this conveyance Mrs. Sargent was 83 years old, in good health and showed remarkable vigor of mind and body for one of her age. In 1920 she traveled abroad, and

it was not until 1931 that she died and this as a result of a fall. The evidence does not warrant a finding that when, in 1919, she conveyed the property in trust, she was transferring it in contemplation of death. She was merely carrying forward a plan which originated in 1907, without any thought or consciousness of impending death or of effecting a testamentary disposition of her property. The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiary is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes.

By the terms of the trust, the trustees were to pay one-half of the net income to the decedent during her lifetime and the other one-half to her three children until her death; then all of the income was to go to the children. Upon the death of the last survivor of the decedent and the three children who were the beneficiaries, the trust was to terminate, and the trust res was to be distributed according to the terms of the trust agreement.

The declaration of trust contained no provision by which the settlor reserved any right to alter, amend or revoke the trust, either alone or in conjunction with any other person. The instrument did contain, however, the following provision for terminating the trust:

> "EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded * * *, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent,

if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, * * *."

Then follow provisions for the payment of the shares to any child who was not then living.

There was a provision in the instrument that, in case of absence from the United States of any trustee thereunder, the other two trustees could exercise all the powers of the trustees and perform their duties. It appeared in the evidence that this provision was inserted because one of the trustees, Arthur H. Sargent, resided a considerable portion of his time in Paris, although at the time of the decedent's death, and for some substantial period prior thereto, he was in this country.

The trust also provided for the filling of vacancies by the remaining trustees, if any one of the trustees should die or resign.

In 1920 Mrs. Sargent resigned as trustee, and her daughter Mary Adelaide Poor was appointed by the remaining trustees to fill the vacancy. Mrs. Poor held office until November 9, 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The deceased continued to be one of the trustees until the time of her death on January 22, 1931. The other trustees, Arthur H. Sargent and Harry LeBaron Sampson, continued as trustees throughout the whole period, from the beginning of the trust until the death of Mrs. Sargent.

Parties are agreed as to the value of the property transferred by trust. It is contended that the value was properly included in the gross estate of the decedent because it fell within section 302 (c) of the Revenue Act of 1926. This section authorized the inclusion in the gross estate of a decedent of the value at the time of his death of property "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment

at or after his death, except in case of a bona fide sale for an adequate and full consideration in money and money's worth."

I have found as a fact, and I now rule as a matter of law, that the transfer by trust was not made in contemplation of death. *United States* v. *Wells et al., Excrs.*, 283 U.S. 102. Nor can it be ruled that the transfer was one to take effect in possession or enjoyment at or after the decedent's death, in view of *Reinecke, Coll.* v. *Northern Trust Co.*, 278 U.S. 339; *May* v. *Heiner, Coll.*, 281 U.S. 238; *Burnet, Com'r* v. *Northern Trust Co.*, 283 U.S. 782; *Morsman, Admr.*, v. *Burney, Com'r*, 283 U.S. 783; *McCormick et al. Excrs.* v. *Burnet, Com'r*, 283 U.S. 784.

The reservation of a portion of the income to herself during her lifetime does not prevent the transfer from being a completed transfer and beyond the reach of the statute.

May v. *Heiner, Coll., supra.*
McCormick et al. Excrs. v. *Burnet, Com'r, supra.*
Morsman, Admr. v. *Burnet, Com'r; supra.*
Burney, Com'r v. *Northern Trust Co., supra.*

In *McCormick et al. Excrs.* v. *Burnet, Com'r, supra,* the trust contained provisions whereby the settlor could terminate the trust with the consent of one or more of the beneficiaries. This reservation was held to be insufficient to bring the transfer within the statute, and to the same effect was *Reinecke, Coll.* v. *Northern Trust Co., supra.*

The controlling question here is whether the transfer comes within the reach of 302 (d) of the Revenue Act of 1926 which required that the value of the gross estate of a decedent should be determined by including the value at the time of his death of property "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in con-

junction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

The 1926 statute expressly provided that transfers that came within subdivision (d) should apply to transfers, trusts, etc., whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

If it should be held that the transfer by the decedent by trust came within the definition of 302 (d) then the further question remains, whether this statute, operating upon a transfer fully completed prior to the enactment of the statute, can be upheld as a constitutional enactment.

It is the defendant's contention, as I understand it, that the provisions of the trust indenture whereby the trustees could, at any time, terminate it, rendered the enjoyment thereof subject to change through the exercise of a power by decedent in conjunction with another to revoke the trust. This contention, in my opinion, is not sound. Whatever powers the trustees enjoyed to terminate the trust could be exercised as well after as before the death of the decedent. No power conferred upon the trustees ended upon the event of death, nor did the event bring into being, or ripen, any right or interest in survivors. There was no power of control, or power of revocation, reserved to the donor. In this respect the case is readily distinguished from *Porter* v. *Commissioner*, 288 U.S. 436, where the trust indenture contained a reservation subject to specific limitations which left the settlor "dominant in respect of other dispositions of both corpus and income." The Court further observed:

> "His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calcu-

lation to ascertain the amount of what in Sec. 301 is called the net estate."

The fact that at the time of her death she was one of the trustees does not affect the legal results. She held office by virtue of an appointment by the other trustees, and not by virtue of any reservation in the trust deed. But if she had never resigned, the transfer by her would have been none the less complete because she was one of the original trustees.

Reinecke v. *Northern Trust Co., supra.*

I do not find that *Reinecke* v. *Smith,* 289 U.S. 172, cited by the defendant, lends support to his contention. In that case the indenture provided that it could be modified at any time by the donor and one of the trustees. The donor (not a beneficiary), his son (a beneficiary) and a bank with trust powers, were the trustees. The case arose under the income tax provisions of Sec. 219 (g) of the Revenue Act of 1924 (43 Stat. 253). The Court held that the income was taxable. I see nothing in that decision inconsistent with *Reinecke* v. *Northern Trust Co., supra,* or *McCormick* v. *Burnet, supra,* which held that where revocation was dependent upon joint action of grantor and the beneficiary, the transfer was effective when made and not at death. This is evident from the language of the opinion to the effect that the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income.

If it were necessary to hold the transfer in question as one within 302 (d), I am unable to see how one can escape the conclusion that the statute, when applied to a transfer wholly completed before the enactment of the law, would be beyond the powers of Congress.

Nichols v. *Coolidge,* 274 U.S. 531.
Reinecke v. *Northern Trust Co., supra.*
See also *Untermyer* v. *Anderson,* 276 U.S. 440.
Blodgett v. *Holden,* 275 U.S. 142.

In reaching my conclusion that the transfer here involved does not come within the sweep of 302 (d), I am following *Reinecke* v. *Northern Trust Co., supra*, in resolving doubts in favor of the taxpayer and adopting that construction which upholds the Act.

It follows that the Commissioner improperly included in the decedent's gross estate the value of the property transferred in 1919 to trustees and that plaintiff, therefore, is entitled to recover the deficiency tax of $2,533.46 unlawfully exacted, together with interest thereon.

DEFENDANT'S ASSIGNMENT OF ERRORS.

[Filed October 25, 1934.]

The defendant in this case in connection with his petition for appeal makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I. That the District Court erred in ruling that the plaintiffs were entitled to recover.

II. That the District Court erred in refusing to make the following rulings of law requested by the defendant:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

III. That the District Court erred in making the following findings and rulings:

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the Trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

. . . . . .

7. The provision of Article Eighth of the Sargent Trust reading "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder," and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the

provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

IV. That the District Court erred in denying the defendant's motion for judgment.

V. That the District Court erred in ruling that no portion of the value of the property in question was properly included in the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

Wherefore, the defendant prays that the judgment be reversed and that the District Court be ordered to enter an order reversing the judgment of the District Court in said cause.

By his Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

A citation on appeal was issued on October 25, 1934, being made returnable in the U. S. Circuit Court of Appeals on November 24, 1934. Service of said citation was duly acknowledged by the plaintiffs.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendant, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 5625, Law Docket,

MARY ADELAIDE POOR and GEORGE WINTHROP SARGENT,

SURVIVING EXECUTORS OF THE WILL OF ADELAIDE J. SARGENT, DECEASED, PLAINTIFFS,

v.

THOMAS W. WHITE,

FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this 24th day of November, A.D. 1934.

JAMES S. ALLEN, CLERK.

[SEAL]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On January 8 and 9, 1935, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., circuit judges, sitting.

Thereafter, to wit, on the thirty-first day of January, A. D. 1935, the following opinion of the court was filed:

United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2980

THOMAS W. WHITE, FORMER COLLECTOR, DEFENDANT, APPELLANT

v.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS, PLAINTIFF, appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

January 31, 1935

BINGHAM, *J.*: This is an appeal from a judgment of the Federal District Court for Massachusetts in an action at law brought July 10, 1933, by the executors of the will of Adelaide J. Sargent against White, former collector for the district, to recover a Federal estate tax paid by them in the amount of $2,377.89 with interest, on the ground that it was erroneously assessed and collected. The trial was had before the court, a jury having been waived in writing. The case was heard upon an agreed statement of facts and evidence presented at the trial. The court found the facts stipulated to be true and that the decedent's transfer of certain property to trustees, the value of which the Commissioner included in her gross estate, was not made by her in contemplation of death.

It appeared that on December 31, 1919, the decedent created the trust involved in this suit with a view of accomplishing three things, which she had failed to do in previous trusts she had revoked. The

first was to more definitely fix the shares of the beneficiaries; the second to join a disinterested trustee having no beneficial interest in the trust; and the third to eliminate any reserved power of revocation as to the income, believing that then the portions payable to the beneficiaries, other than herself, could not be taxed to her. The original trustees were the decedent, her son, Arthur H. Sargent (a beneficiary under the trust), and Harry Le Baron Sampson, a disinterested person without beneficial interest; and on December 31, 1919, the decedent transferred to the trustees the real and personal property, the value of which the Commissioner included in the gross estate.

By the terms of the trust the trustees were to pay one-half of the net income to the decedent during her life and the other half to her three children, and, on her death, pay all the income to the children. The trust was to terminate upon the death of the last surviving beneficiary and the corpus of the trust was then to be distributed according to the terms of the trust. The trust instrument contained the following provision for an earlier termination of the trust:

"Eighth. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed, and acknowledged *by them* and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, . . ." (Italics supplied.)

Then follow provisions for the payment of any shares to her children if she be not then living.

There was a provision in the instrument that, in case of the absence from the United States of any trustee hereunder, the other two trustees could exercise all the powers of the three trustees and perform all their duties. Arthur H. Sargent, one of the trustees, resided a considerable portion of the time in Paris, but at the time of the decedent's death and for some substantial period prior thereto he was in this country. There was also a provision for filling vacancies by the remaining trustees in case one should die or resign. In 1920 Mrs. Sargent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed to fill the vacancy. She held office until November 1, 1921, when she resigned and the decedent was reappointed. Thereafter she continued as trustee until her death, January 3, 1931. The other two trustees served from the beginning of the trust until after the death of Mrs. Sargent.

There is no dispute as to the value of the property transferred in trust. The only question before us on this appeal is whether the transfer comes within the provisions of section 302 (d) of the Revenue Act of 1926. Section 302 (d) of that act provides:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

It was also provided in the act of 1926 that subdivision (d) of section 302 should apply to transfers in trust, etc., whether made, created, arising, or existing before or after the enactment of the act.

The District Court, in construing the eighth provision of the trust, ruled, as a matter of law, that, although the decedent, as trustee, had, at the date of her death, in conjunction with the other trustees, power to terminate the trust estate, as donor or settlor she had no power, under the provisions of the trust, to revoke the trust, and that consequently the provisions of section 302 (d) did not apply. The court apparently indulged in the thought that, as those constituting the body of trustees after Mrs. Sargent's death could terminate the trust, should it then exist, and the power did not end with her death, her inclusion in the board of trustees, prior to and at the time of her death, relieved her of having a power which she as settlor could exercise in conjunction with others within the meaning of section 302 (d).

The decedent, prior to and at the time of her death, under the provisions of the eighth article of the trust, apparently had power that she might have exercised in conjunction with others to terminate the trust within the language of section 302 (d), whether you call her a settlor or trustee, both of which she was. To hold otherwise would be to disregard substance for form. Section 302 (d) is not limited to cases where the decedent has power to revest title to the corpus of the trust in himself. The case of *Porter* v. *Commissioner*, 288 U. S. 436, puts that question to rest. Neither is there an express qualification in that section requiring that the power reserved shall be exercisable by the decedent alone or in conjunction with one not having an adverse interest. The language of the statute is "alone or in conjunction with any person." But if decedent's power to revoke under that section can be exercised only alone or in conjunction with a person not having a beneficial adverse interest, it would seem that Congress intended that the words "any person" should mean any person not having such interest. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 344, 346.

The Reinecke case involved the assessment and collection of an estate tax upon the estate of the trust company's testator under the Revenue Act of 1921, c. 136, s. 402 (c) (42 Stat. 227). There were seven trusts involved. With two we are not concerned. The remaining five trusts were created in 1918, before the passage of

the Revenue Act of 1921, but after the enactment of similar provisions of the estate tax in the Revenue Act of 1918. "With respect to each of these five trusts a power was also reserved 'to alter, change, or modify the trust', which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts by the settlor and a majority of the beneficiaries named, acting jointly. The settlor died . . . with the beneficiaries and life tenants designated in the trusts surviving him, and without having modified any of the five trusts except one, and that in a manner not now material. The commissioner, in fixing the amount of the estate for tax purposes included the corpus of all seven trusts. . . ."

By section 302 it was provided that in calculating the tax there shall be included in the gross estate all property, tangible and intangible, "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, . . . intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) . . ."

In passing upon the question of the liability of the estate of the decedent to be taxed upon the corpus of the five trusts due to the power reserved in the trust instrument "to alter, change, or modify the trust", the court said, at page 346:

"If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent in the case of four of the trusts of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust [property], for all practically purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

And having reached the conclusion that the transfers were complete at the date of the execution of the trusts because the power to revoke or alter in five of the trusts was dependent upon the consent of at least one person having a beneficial and consequently adverse interest, the Supreme Court held the corpus of the five trusts was not taxable to the estate, and affirmed the judgment of the court below in favor of the executor.

The beneficial adverse interest of Arthur H. Sargent was substantial and this being so we are not called upon to determine whether an interest of a lesser character would answer the requirement.

The decedent could not have revoked or terminated the trust without the consent of the other two trustees. A termination of the trust required joint action on the part of the trustees. At the time of Mrs. Sargent's death, and for some time prior thereto, all three

trustees were in this country and had the decedent desired to revoke or terminate the trust, she would have needed to obtain the consent of Arthur H. Sargent as well as that of Sampson. See *Reinecke* v. *Smith*, 289 U. S. 172, 178.

In view of the decision in *Reinecke* v. *Northern Trust Company*, we are of the opinion that the decedent before and at the time of her death had no power by which she could effect a change of interests in the trust, and consequently that the corpus of the trust was completely transferred to the trustees at the date of the execution of the trust instrument, for whatever power was reserved to her could only be exercised in conjunction with one having a beneficial adverse interest. If A gives property to B, reserving to himself the right to revoke the same only upon B's consent, the transfer is complete, the reservation is nil, and whether A gets the property back or not lies wholly with B. If a transfer back is made with B's consent, it would be a gift back and not a revocation. This is in substance the situation here.

For the reasons here stated the order is:

The judgment of the District Court is affirmed.

On the same day, to wit, January 31, 1935, the following judgment was entered:

Judgment

January 31, 1935

This cause came on to be heard January 8 and 9, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 31, 1935, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on March 4, 1935, mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 61, inclusive, contain and are a true copy of the record and all proceedings to and including April 20, 1935, in the cause in said court numbered and entitled "No. 2980, Thomas W. White, Former Collector of Internal Revenue, defendant, appellant, v. Mary Adelaide Poor et al., Surviving Executors, plaintiffs, appellees."

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twentieth day of April, A. D. 1935.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 827, Helvering, Commissioner of Internal Revenue, vs. Helmholz, as Sole Devisee, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, petitioner

v.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas W. White, former Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on January 31, 1935, affirming a judgment of the District Court.

OPINIONS BELOW

The opinion of the District Court (R. 43) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals is reported in 75 F. (2d) 35.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 31, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent transferred certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, with certain remainders over. The trust instrument provided that the trust might be terminated at any time by the trustees, such termination to be evidenced by written declaration signed, sealed, and acknowledged by them. The questions presented are:

1. Whether the property transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the property was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons, to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *. (U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as stipulated by the parties (R. 8–33) and as found by the District Court (R. 43–45) may be summarized as follows:

In 1919 the decedent conveyed certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, and thereafter all the income to go to the children, and upon the death of the last survivor of the decedent and the three children the trust was to terminate and the corpus to be distributed to certain specified beneficiaries (R. 12–15).

The trust instrument provided in part as follows (R. 18):

> Eighth. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed, and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation.

The trust agreement also provided as follows (R. 16):

> In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all

> their duties, and the trustee so absent shall not be liable for the acts or omissions of his cotrustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed, and acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

The son of the decedent, who was one of the trustees and also a beneficiary, spent considerable time abroad, although at the time of the decedent's death and for some time prior to her death, he was in this country. The trust instrument also provided for the filling of vacancies by the remaining trustees if any of the trustees should die or resign. In 1920 the settlor resigned as trustee and her daughter, Mary Adelaide Poor, was appointed by the remaining trustees to fill the vacancy. Mrs. Poor held office until November 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The decedent continued to be one of the trustees until the time of her death in January 1931. The other trustees, Arthur H. Sargent and Harry LeBaron Sampson, continued as trustees throughout the whole period from the beginning of the trust until the death of Mrs. Sargent (R. 45).

There was no dispute as to the value of the property transferred by trust (R. 45).

The case was tried without a jury in the United States District Court for Massachusetts. The Dis-

trict Judge rendered judgment for the plaintiffs for the amount of the estate taxes, which they had paid on account of including the corpus of the trust in the gross estate of the decedent. An appeal was taken to the Circuit Court of Appeals for the First Circuit which affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the First Circuit erred:

1. In failing to determine that the value of the property in question, which was transferred in trust by the decedent, should be included in her gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

2. In refusing to find that the corpus of the trust, less the value of the interest, given to the son, who was also a trustee, should be included in the settlor's gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926 which are also involved in *Helvering* v. *City Bank Farmers Trust Co.*, No. 805, October Term, 1934, and *Helvering* v. *Helmholz*, No. 827, October Term, 1934, in which the Govern-

ment is seeking certiorari to the United States Circuit Court of Appeals for the Second Circuit and the United States Court of Appeals for the District of Columbia, respectively. In addition to the reasons set forth in our petitions in those cases, the decision of the lower court is in conflict with a recent decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner* v. *Strauss,* decided March 30, 1935, and not yet officially reported but may be found in Vol. 3, C. C. H., 1935, p. 9751. In the *City Bank Farmers Trust Co.* case the taxpayer has filed a memorandum not opposing certiorari because of the decision of the Seventh Circuit in the *Strauss* case.

For the reasons set forth in our petitions in the *City Bank Farmers Trust Co.* case, *supra,* and in the *Helmholz* case, *supra,* it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 36

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, petitioner

v.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 43–49) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals for the First Circuit (R. 53–57) is reported in 75 F. (2d) 35.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 31, 1935. (R. 57.) Petition for writ of certiorari was filed April 29, 1935, and was granted May 20, 1935. (R. 58.) The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent transferred certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, with certain remainders over. The trust instrument provided that the trust might be terminated at any time by the trustees, such termination to be evidenced by written declaration signed, sealed, and acknowledged by them. The questions presented are:

1. Whether the property transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the property was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons, to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the decedent's gross estate of the value of the interests of the decedent's children, other than the son Arthur, in a trust created by the decedent, where the decedent, in conjunction with her son Arthur who had an

interest in the trust, and another person, had the power to alter, amend, or revoke the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> (U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The essential facts as stipulated and found by the District Court (R. 43–45) are as follows:

In 1919 the decedent, Adelaide J. Sargent, conveyed certain property to herself, her son, and a third person, as trustees, to pay one-half of the net income to the decedent during her lifetime and the other half to the decedent's three children until her death, and thereafter all the income to be paid to the children, and upon the death of the last survivor of the decedent and her three children, the trust was to terminate and the corpus was

to be distributed to certain specified beneficiaries. (R. 13–14, 44.)

The trust instrument provided in part as follows (R. 44–45):

> EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded * * *, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, * * *.

The trust agreement also provided as follows (R. 16):

> In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed and

acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

The son of the decedent, who was one of the trustees and also a beneficiary, resided considerable time abroad, although at the time of the decedent's death and for some time prior to her death, he was in this country. (R. 45.) The trust also provided for the filling of vacancies by the remaining trustees if any of the trustees should resign or die. (R. 45.) In 1920 decedent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed by the remaining trustees to fill the vacancy. Mary Adelaide Poor held office until November 9, 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The deceased continued as one of the trustees until the time of her death on January 22, 1931. The other trustees, the decedent's son, Arthur H. Sargent, and Harry LeBaron Sampson, served as trustees from the creation of the trust until the death of the decedent. (R. 45.)

The case was tried without a jury in the United States District Court for Massachusetts. The District Judge rendered judgment for the respondents for the amount of the decedent's estate taxes, which they had paid on account of including the corpus of the trust in the gross estate of the decedent. (R. 49.) The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the First Circuit erred:

1. In failing to determine that the value of the property in question, which was transferred in trust by the decedent, should be included in her gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

2. In refusing to find that the corpus of the trust, less the value of the interest, given to the son, who was also a trustee, should be included in the settlor's gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

ARGUMENT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926, *supra,* which are also involved in *Helvering* v. *City Bank Farmers Trust Co.,* No. 10, October Term, 1935; and *Helvering* v. *Helmholz,* No. 14, October Term, 1935; and this case has been assigned for argument immediately following the argument of those cases. In the interest of brevity, the petitioner adopts and incorporates herein by reference the argument presented in the brief filed on behalf of the petitioner in *Helvering* v. *City Bank Farmers Trust Co., supra.*

We submit that the instant case clearly falls within the provisions of Section 302 (d), *supra,* because decedent by means of Article Eighth of

the trust instrument, *supra*, reserved to herself, in conjunction with two other persons, the power to terminate the trust at any time. The fact that the power to terminate the trust was reserved to the decedent in her capacity as a trustee, and not individually, furnishes no sound distinction, and the court below so held.

Respondent may argue that because in the instant case the conveyance in trust was made before the appearance in any taxing statute of any provision similar to Section 302 (d), *supra*, the application of Section 302 (d) to the transfer here involved is unconstitutional. We submit, however, that the constitutionality of the statute as applied to the instant transfer should be sustained on the ground that *by reason of the reservation of power the transfer was not fully completed until the death of the decedent*, which event occurred subsequent to the passage of the statute in question. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Tyler* v. *United States*, 281 U. S. 497; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160; *Klein* v. *United States*, 283 U. S. 231; *Porter* v. *Commissioner*, 288 U. S. 436. As stated by the Supreme Court in *Tyler* v. *United States, supra* (pp. 502–503):

> A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the

> bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

And in the case of *Porter* v. *Commissioner, supra,* where the transfers were made before the enactment of any statutory provision like Section 302 (d), and where the taxing of those transfers was therefore open to the same constitutional attack of retroactivity as is the taxing of the transfer in this case, this Court nevertheless approved their inclusion in the gross estate of the decedent, saying (p. 444):

> His death terminated that control, ended the possibility of any change by him, * * *. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation

to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do.

Moreover, it is submitted that in the case at bar, for all practical purposes, the decedent retained substantial control over the disposition of the property in conjunction with the disinterested trustee, and that the control placed in her son in substance amounted to very little. This is apparent from the facts, in that the son, Arthur H. Sargent, was a resident of Paris, France, for the major portion of the period in question, and that, under Article 2 of the trust agreement, the other two trustees could exercise all the powers during his absence from the United States. The fact that he was not absent from the United States at the time of her death does not preclude the application of the statute, which is concerned with the *possibility* of the decedent's exercising control over the trust estate.

If this Court be of the opinion, however, that the interest of Arthur H. Sargent was an adverse interest and cannot constitutionally be included in the decedent's gross estate, then we submit that the interests of the decedent's other children in the trust estate should have been included in the decedent's gross estate, since as to those interests the interest of Arthur H. Sargent was not adverse, and

the doctrine of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, does not apply. Accordingly, even if this Court should be of the opinion that the adverse interest of Arthur H. Sargent precludes the inclusion of his interest in the trust in the decedent's gross estate, the decision below should be reversed and the case remanded to determine the value of the interests of the decedent's children, other than Arthur H. Sargent, and to require the inclusion of the value of such interests in the decedent's gross estate. In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit held that, while the value of the life estate of a wife in a trust created by her husband could not be included in the husband's gross estate because it was only in conjunction with the wife that the husband could amend or revoke the trust, the value of the remainder interest in the trust was nevertheless taxable.

CONCLUSION

We respectfully submit that the decision of the court below is erroneous and should be reversed.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
DAVID E. HUDSON,
SEWALL KEY,
BERRYMAN GREEN,
Special Assistants to the Attorney General.

SEPTEMBER, 1935.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 926.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE.

PETITIONER.

v.

MARY ADELAIDE POOR et al, SURVIVING EXECUTORS OF THE WILL OF ADELAIDE J. SARGENT,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

ARGUMENT.

The decision of the Circuit Court of Appeals for the First Circuit in this case is not in conflict with the decision of any other Circuit Court of Appeals in construction of Section 302 (d) of the Revenue Act of 1926.

The decision of the Circuit Court of Appeals was that the power of the trustees of the Sargent Trust to terminate the trust was not within the scope of Section 302 (d), because it was not a power to revoke.

A brief examination of the facts will show that this decision involves no construction of Section 302 (d) which is in conflict with the construction placed upon it by any other Circuit Court of Appeals or with principles established by this Court. The power in the Sargent Trust, which was in terms a power to terminate the trust as to all or any part of the trust property, was given to the persons who should be trustees at the time of any exercise of it (Record, p. 18). The decedent's right to share in the exercise of the power was hers solely because of the fact that she was one of the trustees, and the continuance of this right in her was wholly dependent upon her continuing to hold the office of trustee. When she resigned in 1920 her right to share in any exercise of the power ceased. When she was reappointed by others in 1921, she regained the right to share in the exercise of the power. At the time of her death her right to share in the exercise of the power was derived, not from any reservation of power to herself at the time of creation of the trust, but from an appointment as trustee made later by persons over whom she had no powers of control. The power of the trustees to terminate was not limited to her life time but continued in surviving and succeeding trustees unaffected by her death, except that her death put an end to the possibility of reconveyance to her on any termination.

When these facts are taken in connection with the fact that at no time prior to her death could the power have been exercised without the voluntary joinder therein of two other trustees one of whom was a principal beneficiary whose interests were adverse to any termination during her life time, it seems clear that the word "revoke" used in its broadest sense is not fairly descriptive of or applicable to this power.

The determination that this power was not within the scope of Section 302 (d) did not involve reading into that

section any such qualification of the words "any person" as the Circuit Courts of Appeals for the Seventh Circuit considered unwarranted in *Commissioner of Internal Revenue* v. *Strauss* and the decided facts of the case at bar are so different from those of the last cited case that there is no actual conflict between the two decisions. In the cited case the power was contained in a trust indenture executed by the settlor and his wife and was in the form of an agreement that,

> ". . . this instrument and all the rights, powers, prerogatives, therein granted and all duties or obligations imposed upon either of the parties hereto, *may be cancelled, revoked and terminated upon the mutual consent of the parties hereto;* in which event said trust estate shall again revert to said first party, to have and to hold the same in precisely the same manner as though this instrument had not been executed." (Italics supplied).

The only substantial point of similarity of this power with the power in the case at bar was the fact that it could not be exercised without the joinder of a beneficiary, whose interest appears to have been adverse to termination. It is submitted there is no actual or necessary conflict between the decision of the Court in the cited case and the decision in the case at bar.

The facts outlined above also differentiate the case at bar from *Commissioner of Internal Revenue* v. *City Bank Farmers Trust Co.*, 74 F. (2d) 242, and *Helvering* v. *Helmholz*, 75 F. (2d) 245, in which petitions for certiorari have been filed.

The decision of the Circuit Court of Appeals in the case at bar that the decedent's transfer in trust was a complete transfer of all her interest in the corpus of the trust property and beyond her power to recall at the date of execution of the trust instrument, in 1919, is in full accord with the

principles laid down and applied in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and in *McCormick* v. *Burnet*, 283 U. S. 784 (for facts see *Commissioner of Internal Revenue* v. *McCormick*, 43 F. (2d) 277), and recently recognized as still applicable in *Porter* v. *Commissioner*, 288 U. S. 436.

It seems proper to point out, as a further reason why certiorari should not be granted, that the application of the provisions of Section 302 (d) to impose or measure an estate tax upon this decedent's estate by reason of her transfer in trust, fully completed several years before these or any similar provisions became part of the estate tax law, would be an unconstitutional exercise of the taxing power since it would be the taxing of a transfer by legislation enacted after the privilege of transfer has been fully exercised. It is settled that it is beyond the power of Congress to impose such a tax.

Nichols v. *Coolidge*, 274 U. S. 531.
Untermeyer v. *Anderson*, 276 U. S. 440
Coolidge v. *Long*, 282 U. S. 582.
Blodgett v. *Holden*, 275 U. S. 142.

This constitutional question was in issue and was argued both before the District Court and before the Circuit Court of Appeals. Upon this point it was said by the Judge of the District Court:

> "If it were necessary to hold the transfer in question as one within 302 (d), I am unable to see how one can escape the conclusion that the statute, when applied to a transfer wholly completed before the enactment of the law, would be beyond the powers of Congress." Record, p. 48.

The Circuit Court of Appeals expressed no opinion upon this question, resting its decision wholly upon the point that the power to terminate the trust was not a power to alter,

amend or revoke within the scope and meaning of Section 302 (d).

It is respectfully submitted that no useful purpose would be accomplished by a review of this case on certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 36.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE,

PETITIONER.

v.

MARY ADELAIDE POOR et al, SURVIVING EXECUTORS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR MARY ADELAIDE POOR, ET AL., EXECUTORS.

HARRY LEBARON SAMPSON
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Counsel for Respondents,
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BRIEF FOR MARY ADELAIDE POOR ET AL., EXECUTORS.

OPINIONS BELOW

The opinion of the District Court (R. 43–49) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals for the First Circuit (R. 53–57) is reported in 75 F. (2nd) 35.

QUESTIONS PRESENTED

This is an action at law against a collector of Internal Revenue brought by the executors of the will of Adelaide J. Sargent to recover an estate tax assessed under the Revenue Act of 1926. It is before this Court on a writ of certiorari

issued to review a judgment of the Circuit Court of Appeals for the First Circuit which affirmed a judgment for the plaintiffs entered in the District Court for the District of Massachusetts.

The decedent died in 1931. She had transferred certain property in 1919 to herself, her son Arthur H. Sargent, and a third person, as trustees, in trust to pay one-half of the income to the decedent during her lifetime and the other half (and, after her death, all of the income) in equal shares to her three children (including said Arthur H. Sargent) or their appointees or issue, until the death of the last survivor of her children, at which time the capital of the trust was to be divided among the appointees or issue or next of kin of her three children. The trust instrument provided that the trust might be terminated as to any or all of the property at any time by the persons who might at the time be trustees by a written declaration signed, sealed and acknowledged by them and duly recorded. The decedent ceased to be a trustee in 1920, but was appointed trustee again in 1921 and was a trustee at the date of her death.

The question presented is whether the value of the property belonging to the trust should be included in the gross estate of the decedent in computing the estate tax.

The principal subsidiary questions involved are:

1. Whether, because of the existence of a power of termination given to the trustees, the transfer was one the enjoyment of which was subject, at the date of the decedent's death, to a "change through the exercise of a power either by the decedent alone, or in connection with any person, to alter, amend or revoke" within the meaning of section 302(d) of the Revenue Act of 1926.

2. Whether the provisions of section 302(d), if applied to the transfer in this case, which was completed before the Act was passed, would violate the Fifth Amendment to the Constitution of the United States.

3. Whether, if there are valid objections against including in the gross estate the share in the trust property which belonged to Arthur H. Sargent, the shares of the other two children of the decendent may be included in the gross estate.

STATUTES INVOLVED

The statutes involved are Section 302 of the Revenue Act of 1926 and its sub-sections (d) and (h) (c. 27, 44 Stat. 9, 70, 71). The material portions read as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —"
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> . . . . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The first statute which contained provisions similar to those of Section 302(d) of the Revenue Act of 1926 was Section 302(d) of the Revenue Act of 1924, c. 234, 43 Stat. 304, which reads as follows:

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power, in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;"

The Fifth Amendment to the Constitution of the United States, which is also involved, reads as follows:

"Art. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The portion of Section 302(c) of the Revenue Act of 1926 c. 27, 44 Stat. 70, which is referred to in the argument is as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . ."

STATEMENT OF MATERIAL FACTS

Adelaide J. Sargent died on January 22, 1931. She was a resident of Boston, Massachusetts, and a citizen of the United States. Her last will was allowed and the respondents, Mary Adelaide Poor and George Winthrop Sargent, together with Arthur H. Sargent, since deceased, were appointed executors on February 19, 1931. (R. 8–9).

The Commissioner of Internal Revenue included in the decedent's gross estate the value of the property of the trust created by her in 1919, amounting to $437,891.42 (R.10). There is no dispute as to this value. (R.33). The estate of the decedent, exclusive of this trust property was less than the allowable deductions and exemptions (R.11–12). Accordingly the validity of the entire tax depends upon whether the value of the trust property was properly included in the decedent's gross estate.

The trust referred to was created by the decedent on December 31, 1919, by a conveyance of certain property to three trustees, who were herself, Arthur H. Sargent, who was her son, and a third person not connected with the family, to be held in trust under the terms of a contemporaneous declaration of trust executed by them called "The Sargent Trust" (R. 9, 12). A copy of this declaration is annexed to the Agreed Facts marked Exhibit C (R.12–18). By its terms the trustees were to pay one-half of the net income to Adelaide J. Sargent during her lifetime and the other half of the net income, up to the time of her death, (and all of it after her death) in equal shares to such of her three children Arthur H. Sargent, George Winthrop Sargent and Mary Adelaide Poor, as should be living at the time of such payments and to the appointees of such child or children as should have died prior thereto, or in default of such appointment, to the then living issue of such deceased child or children (R.13). The trust was limited to terminate upon the death

of the last survivor of Adelaide and her three children, and on such termination the capital was to be divided in designated shares among the issue or next of kin or appointees of the three children. Each child was given a general power of appointment by will over one third of the trust property (R. 14). The decedent's three children survived her (R. 8–9).

In the Declaration of Trust the trustees were given the following power to terminate the trust:

> "EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation." (R. 18).

This power has never been exercised and the trust has never been terminated either in whole or in part. (R. 33).

No power was reserved by the grantor to modify the terms of the trust and the only power of termination was the one given to the trustees by Article Eighth.

Article seventh of the declaration provided that in case of the death, resignation or inability to act of any of the trustees, a successor should be appointed by the surviving trustees by a written instrument signed, sealed and acknowl-

edged by them and approved by the then living children of Mrs. Sargent (R. 17–18).

The following changes in the personnel of the trustees were made prior to Mrs. Sargent's death in the manner provided for in Article Seventh. On November 9, 1920, the decedent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed to fill the vacancy. After serving as trustee for one year, Mrs. Poor resigned on November 9, 1921, and the decedent was appointed to fill the vacancy and thereafter continued as one of the three trustees until her death (R. 33). The decedent's son, Arthur H. Sargent, was one of the trustees from the beginning of the trust until after the death of the decedent and was also a beneficiary under the trust, having a vested interest in an undivided share of the income and a power to appoint by his will his share of the income and one-third of the capital of the trust (R. 32–33, 12–14).

Most of the property included in the conveyance in trust came to Mrs. Sargent either directly from her husband who died long prior to the creation of the trust or from reinvestment of the proceeds of sales of property received from him (R. 9–10). The trust superseded two earlier trusts of substantially the same property made by the decedent in 1907 and in 1911 for the benefit of herself and her three children. The purpose of the 1919 trust, which is the trust now involved, was to fix more definitely the shares of the beneficiaries, to join as trustee a person of independent judgment who was not a member of the family and who was not beneficially interested in the trust, and to eliminate a power of revocation which the decedent had under the former trusts (R. 39, 43).

The executors objected to the determination of the Commissioner that the value of the trust property should be included in the decedent's gross estate and paid the tax under protest. Thereafter claim for refund was duly filed, the Commissioner rejected the claim and all formalities re-

quired in order to maintain suit for recovery of the tax were complied with (R. 9–11, 21–32).

DECISIONS BELOW

In the District Court trial by jury was waived (R. 8) and the case was heard by Brewster, J. on agreed facts (printed at pages 8–33 of the Record) and on oral testimony which was not reported, bearing chiefly on whether the transfer in trust was made in contemplation of death (R. 39). The Judge of the District Court found and ruled that the transfer was not made in contemplation of death (R. 43, 46), and that it was not intended to take effect in possession or enjoyment at or after the decedent's death and was not within the scope of Section 302 (c) or Section 302 (d) of the Revenue Act of 1926 (R. 46).

He also ruled that the effect of including the value of the trust property in the gross estate and assessing an estate tax on the resulting net estate would be to impose an excise tax on the transfer by a statute enacted after the transfer was completed and that this would constitute a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States (R. 41–42). He ruled that the executors were entitled to recover the entire tax, amounting to $2533.46, with interest from the date of payment (R. 49). Judgment for the plaintiffs for this amount with interest and costs was entered in the District Court on October 25, 1934 (R. 37–38).

The defendant appealed to the Circuit Court of Appeals for the First Circuit. On this appeal the appellant raised no question as to the finding and ruling of the District Court that the transfer was not intended to take effect in possession or enjoyment at or after the decedent's death and was not within the scope of section 302 (c), but relied on the power of termination contained in the trust instrument as bringing

the transfer within the provisions of sections 302 (d). The Circuit Court of Appeals affirmed the judgment of the District Court, expressing the view that the power in question was not a power to alter, amend, or revoke, within the meaning of section 302 (d), and expressing no opinion as to whether the provisions of this section, if construed as applying in the case at bar, would violate the Constitution of the United States.

SUMMARY OF ARGUMENT

I. The transfer made by the decedent was complete before the enactment of Section 302 (d) or the corresponding provisions of the first statute on the subject, (Section 302 (d) of the Revenue Act of 1924).

The only claim made to the contrary is based on the power of termination given to the trustees and on the fact that the decedent was one of the three trustees. The decedent, however, had no control over the exercise of this power. It could be exercised only by the joint action of all three of the trustees, including the decedent and Arthur H. Sargent (who was a beneficiary of the trust) and the disinterested trustee. As Arthur H. Sargent had a substantial interest which was adverse to the exercise of the power, the transfer was as complete when it was made as if it had been absolute. If this were not so, the transfer would have become complete in November 1920, when the decedent resigned as trustee and thereby lost any right to share in the power. After she was reappointed in 1921 the right which she then had was derived, not from the original transfer, but from the reappointment made by the other trustees with the written assent of all the other beneficiaries.

II. Section 302 (d) should not be construed as applying to the power in question.

This section is a part of an estate tax law which is intended to impose taxes on transmission of property on death and on substitutes for testamentary disposition. The transfer in question was neither. The section should be construed so as to avoid the constitutional objections to its validity which would result if the section were applied to such a completed transfer. It is reasonably possible to construe it as not applying to the power in the case at bar, whether it is construed in the light of its evident purpose or literally. If it is construed in the light of its purpose, it has no application; and if it is construed literally, it does not apply because the power to "terminate" was not, on a literal construction, a power to "alter, amend or revoke."

III. The imposition of an estate tax measured in any degree by including the property of the Sargent Trust, if seemingly warranted by Section 302 (d), would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution. There are two constitutional objections to the application of the section to this trust. As the decedent had no interest in the trust property which passed to others at her death and the transfer was not made in anticipation of death or as a substitute for a testamentary disposition, the imposition of a tax on her estate measured by including in the estate the value of this completed transfer would be so arbitrary and unreasonable that it would not be due process of law. Furthermore, as the estate tax is an excise tax, Congress had no power to levy the tax on a transfer which was completed before the enactment of the statute providing for such tax.

IV. There is no basis for a claim that a part of the trust property should be included in the gross estate.

Arthur H. Sargent, one of the trustees whose consent was necessary to any termination, had an undivided

interest in all the property of the trust and consequently his rights would have been adversely affected by the termination of the trust with respect to any portion of the property.

ARGUMENT

I. The transfer made by the decedent was complete before the enactment of section 302 (d) of the Revenue Act of 1926 or corresponding provisions of any earlier statute.

The provisions now found in section 302 (d) of the Revenue Act of 1926 appear in the estate tax law for the first time in substantially the same form in section 302 (d) of the Revenue Act of 1924 (c. 234, 43 Stat. 304). The transfer in question was complete when the Sargent Trust was created in 1919. From the beginning of the trust the settlor had no control over the trust property which enabled her to shift the economic interests in the trust. The only beneficial interest left in her, after this transfer, was a right to one-half of the income during her lifetime. It is settled that the reservation of such an interest does not make a transfer incomplete.

May v. *Heiner*, 281 U. S. 238.
Morsman v. *Burnet*, 283 U. S. 783.

The Sargent Trust gave no power to anyone to alter its terms. No power of appointment was reserved under it to the settlor. The only power which might affect the interest of the beneficiaries was the right to terminate the trust given by Article Eighth to whoever should be trustees when it was exercised. This right was a discretionary one to be exercised by the joint act of all the trustees, and the decedent could not compel the other trustees to exercise it. From the beginning of the trust

until after the death of the decedent, one of the other trustees was Arthur H. Sargent, who had a life interest in the income of one-sixth of the trust (and in one-third after the death of the settlor), the power to appoint his share of the income, and a general power of appointment by will over one-third of the principal. He had an undivided interest in every part of the trust property. Any termination of the trust with respect to any part of the property which would have revested such property in the decedent would have decreased the capital from which Arthur H. Sargent derived his income and the value of the share which he had a right to appoint. His interest was therefore adverse to the termination of the trust in whole or in part. It is clear that the existence of such a right of termination did not give to the decedent any effective control over the economic interests in the property and that the transfer was complete when it was made.

Reinecke v. *Northern Trust Co.*, 278 U. S. 339.
McCormick v. *Burnet*, 283 U. S. 784.

These cases show that where one of the beneficiaries of a trust must join in any termination or modification to make it effective, the transfer is to be treated as an absolute one from the time when it was made.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the question was whether under the provisions of Section 402 (c) of the Revenue Act of 1921, (later incorporated in Section 302 (c) of the Revenue Act of 1926), the value of the property of seven trusts established between 1902 and 1919, was properly included in the estate of a decedent who died in 1922. In two of these trusts the income was reserved to the settlor for life and after his death was to be paid to a designated person until the end of the trust and there were remainders over as to the trust corpus. In each of these two trusts a power to revoke the trust

was reserved to the settlor alone. In the five other trusts the settlor gave life estates to others, to continue until five years after his death or until the death of the respective life beneficiaries, and remainders over as to the corpus. In these five trusts the settlor reserved the power "to alter, change or modify" the trusts, *to be exercised in the case of four trusts by the settlor and the single beneficiary of each trust acting jointly, and in one trust by the settlor and a majority of the beneficiaries acting jointly.* It was held that the value of the property of the two trusts which *the settlor alone* had power to alter, change or modify should be included in the decedent's gross estate, because a transfer subject to such a power in the settlor did not become complete until the settlor's death; but that the transfer of the property included in the other five trusts was complete when the trusts were made because the power reserved to the settlor in those trusts could be exercised only with the consent of one or more of the beneficiaries, and consequently the property in these trusts could not be included in the gross estate. The language of the opinion upon this point, at page 346, is as follows:

> "If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. *Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.*" (Italics ours).

In the same case this Court said, at pages 346–347:

> "The shifting of the economic interest in the trust property which was the subject of the tax *was thus complete as soon as the trust was made.* His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, *the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.*" (Italics ours).

This Court has treated *Reinecke* v. *Northern Trust Co.* as holding that where the exercise by the settlor of a power to alter or revoke a trust is dependent on the consent of a beneficiary whose interests would be adversely affected, the trust property has passed as completely from the control of the settlor as if the gift had been absolute. In *Porter* v. *Commissioner*, 288 U. S. 436, which dealt with the application of Section 302 (d) to a trust in which the *settlor alone* had power to change the disposition of the property, the opinion of the Court distinguished the trust under consideration from the five trusts in *Reinecke* v. *Northern Trust Co.* in which the consent of one or more beneficiaries was necessary, saying as to the latter (at page 442)

> "As title was put beyond his" (the settlor's) "control, we held these transfers not taxable."

In *Reinecke* v. *Smith*, 289 U. S. 172, this Court referred to the decision in *Reinecke* v. *Northern Trust Co*, as follows, at page 176:

> "The tax was upheld as applied to the corpus of trusts over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust.

> In the latter case the transfer was said to be effective when made, not at death. As pointed out in *Burnet* v. *Guggenheim*, 288 U. S. 280, the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income."

The fact that the case of *Reinecke* v. *Northern Trust Co.* related to a tax claimed under Section 302 (c) rather than 302 (d) does not affect the force of the decision as laying down a test of when a transfer is to be regarded as complete. The test thereby established is applicable wherever that question is at issue. The Circuit Court of Appeals in the case at bar has stated the underlying principle as follows: — "If A gives property to B, reserving to himself the right to revoke the same only upon B's consent, the transfer is complete, the reservation is nil, and whether A gets the property back or not lies wholly with B." (R. 57.)

Counsel for the petitioner argues, however, that in the case at bar the control of the power which was placed in Arthur H. Sargent amounted to very little as he was in France a greater portion of the time; that under Article Second of the trust agreement the other trustees could exercise all the powers during his absence from the United States; and therefore that the decedent retained control over the trust property in conjunction with the disinterested trustee. There are two answers to this contention. The first is that the provision in Article Second that in case of the absence of any trustee from the United States, the other trustees might exercise all the powers "herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence . . ." (R. 15–16.) refers to the powers of management contained in Article Second, and does not refer to

the right to terminate, which is given to "the person or persons who shall then be trustees thereunder" in Article Eighth. The second answer is that at the time of the death of the decedent and for several months before, Arthur H. Sargent was continuously in the United States and consequently, on any construction of the provisions relating to the absence of a trustee, the decedent did not have power at the time of her death to terminate the trust without his consent.

Counsel for the petitioner argues, however, that in determining whether the settlor relinquished control in a case like this, the "solidarity of the family is a circumstance of considerable importance". It is at least doubtful whether the phrase "solidarity of the family" has any legal meaning as applied to a situation in which the interests of different members of the family are conflicting. Family lawyers all know the uncompromising attitude which the parties often take under such circumstances. If, however, we yield to the suggestion that the Sargent family would presumably act as a unit, the petitioner gains no advantage. The property in the Sargent Trust had originally come to the decedent from her deceased husband, the father of the three children who were beneficiaries (R. 9–10). The decedent was eighty-three years of age when the trust was formed, and therefore her children were presumably in or past middle life. According to ordinary experience, children exercise more control over parents in such cases than parents do over children, unless the parents happen to hold the purse strings. The children of Mrs. Sargent, including Arthur H. Sargent, would certainly have presented a solid front against any proposition that their share in the property which came from their father should be handed over to their mother at her age, and that they should look to her for the money which they needed for their living expenses and take

the risks that attend the management of property by a person of advanced years.

It also appears affirmatively in the case at bar that the third trustee who must join in any termination of the trust was not under the control of the decedent. One reason for naming him in the beginning was that he was a disinterested person of independent judgment (R. 43). He was originally selected with the approval of the decedent's three children, and was at all times unwilling to join in terminating the trust unless requested to do so by all the children (R. 39). In one of the cases now before the Court for decision, *Commissioner* v. *City Bank Farmers' Trust Co.* 74 Fed. (2d) 242, 246, it was suggested in the Circuit Court of Appeals that it may be material to show as a matter of fact what the attitude of a disinterested trustee was with respect to the exercise of a power.

It should be noted that the decedent had no power to remove any trustee, and that vacancies in the office of trustee were to be filled by appointment by the surviving trustees and "approved by the then living children" of the decedent (R. 17). Accordingly, the decedent had no power to gain control of the trust property by changing the trustees.

In consequence of the facts which have been stated, it appears that the transfer when made by the decedent in 1919 was a complete and irrevocable transfer upon a trust which she was powerless to amend or revoke.

If, however, it should be assumed for the sake of the argument that because of the power of termination given to the trustees the decedent retained some measure of control over the trust property, such control was extinguished on November 9, 1920, when the decedent resigned as trustee, and Mary Adelaide Poor, her daughter, was appointed in her place. At that moment any right which she originally had to share in any exercise of the

power to terminate the trust ceased, long before the enactment of the statute now relied upon by the petitioner.

It is true that she was appointed a trustee one year later when Mrs. Poor resigned. This appointment was made by the remaining trustees in the manner provided for in the trust instrument which required the assent in writing of the three children (R. 17, 33). As was stated in the opinion in the District Court (R. 48), "The fact that at the time of her death she was one of the trustees does not affect the legal results. She held office by virtue of an appointment by the other trustees and not by virtue of any reservation in the trust deed."

It therefore appears that on any view of the facts in this case, the transfer made by the decedent was complete before the taxing statute was passed.

II. The power of termination contained in the Sargent Trust does not bring it within the scope of section 302 (d) of the Revenue Act of 1926.

Section 302 (d) (printed above at page 3) is a part of an estate tax law and should be construed so as to be consistent with the scope and purpose of such a law. An estate tax is laid on the transmission of property from the dead to the living and on transfers which are substitutes for testamentary dispositions of property.

> *Knowlton* v. *Moore*, 178 U. S. 41, 56–7
> *Milliken* v. *United States*, 283 U. S. 15, 23.
> *Heiner* v. *Donnan*, 285 U. S. 312, 322.

As has already been shown in the preceding portion of this brief, nothing remained in the decedent which would pass at her death, and the power given to the trustees did not leave in the decedent any effective control over the trust property. The transfer was not made in con-

templation of death and was not in any respect a substitute for a testamentary disposition. On the contrary, it was a present, absolute gift. Section 302 (d) as a part of an estate tax law should not be construed to include such a gift if such a construction can be avoided.

Another strong reason for construing Section 302 (d) as not applying to this power is found in the constitutional objections to the validity of the Section which would arise if a contrary construction were adopted. The reasons why Section 302 (d) if construed as applying to this power would be invalid as violating the Fifth Amendment to the Constitution of the United States, are presented in a later part of this brief at pages 22-29. They are based upon the unreasonableness of using the value of the trust property to measure a tax on the estate of the decedent, and also upon the fact that the section was not enacted until long after the transfer in question was complete. In order to avoid these constitutional objections, the statute should be construed as not including the power in question if such a construction is fairly possible. The rule which applies is a familiar one and is stated as follows in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The rule has been stated and applied in a great variety of cases and is of general application.

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 390.
United States v. *Standard Brewery*, 251 U. S. 210, 220.
United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, which involved the construction and application of provisions substantially the same as those contained in Section 302 (c) of the Revenue Act of 1926, the rule was applied as follows:

> "Doubts of the constitutionality of the statute if construed as contended by the government, would require us to adopt the construction, reasonably possible here, which would uphold the act."

It is reasonably possible to adopt a construction of Section 302 (d) which excludes the power given to the trustees of the Sargent Trust.

The statute is expressly limited to transfers made by the decedent the enjoyment of which may be changed "through the exercise of a power, either by the decedent alone, or in conjunction with any person, to alter, amend or revoke." It may well be doubted whether the words "either by the decedent alone or in conjunction with any person" were intended to apply to such a power as that given to the Sargent trustees, even if the power were to be regarded as otherwise within the scope of the statute. In view of the obvious and permissible purpose of the statute to tax as part of a decedent's estate those transfers made by him which have been left so incomplete that he has the ability to recall them to himself or to modify the enjoyment of the beneficial interests which he has transferred, and in view of the other considerations which have already been urged in this argument, it is reasonable to construe the quoted words as not applying to a power vested jointly in three trustees of whom the decedent was one, when it affirmatively appears that the decedent had no control over the exercise of the power and that the effective source of the share in the power which the decedent had at death arose from an appoint-

ment of the decedent as a trustee made by the other trustees with the concurrence of the beneficiaries. This appears to have been the view taken by the Judge of the District Court (R. 47–48). In the case at bar, the decedent as an individual could not exercise or require the exercise of the power. Her resignation as trustee in 1920 ended any right which she had to participate in the exercise of the power. Her reappointment in 1921 was the act of the two remaining trustees which required the assent of all three children of the decedent (R. 17, 33, 45, 48). After her reappointment the situation was no different in principle from that which would have existed if she had made an outright gift of the property to her children and then a year later they had put the property in trust, made her a trustee, and given the trustees a power to terminate the trust. Only a literalist would treat Section 302 (d) as applying to such a case. It is submitted that it has no more application to the case at bar than to the supposed case.

If, however, the statute should be construed literally, the power in the Sargent Trust would not be within its scope. The statute applies to powers to "alter, amend or revoke". The power to terminate, which was contained in the Sargent Trust was not a power to alter or amend and is not a power to revoke if that word is to be construed literally. The word "revoke" has no proper application to an act which accomplishes the termination of a trust even though, in consequence of that termination the property may revest in the settlor, unless the settlor himself is to be the dominant actor in exercising the power. Any careful lawyer would describe the power in the case at bar as a power to terminate and not as a power to revoke.

For the reasons which have been stated it is submitted

that Section 302 (d) should be construed as not applying to the power contained in the Sargent Trust.

There is nothing in *Porter* v. *Commissioner*, 288 U. S. 436, which is inconsistent with this conclusion. In that case the settlor reserved to himself alone the power to alter the terms of the trust during his lifetime in any respect except that he could not make changes in favor of himself or his estate. This was clearly a power to "alter" or "amend" which could be exercised by the settlor alone and gave him the power up to the time of his death to determine who should enjoy the trust property. It was on the ground that control was in the settlor alone that the transfer was distinguished from those transfers in *Reinecke* v. *Northern Trust Co.* 278 U. S. 339, which were held non-taxable. The case is clearly distinguishable from the case at bar on the same ground.

III. The imposition of an estate tax upon the estate of the decedent measured in any degree by the value of the property of the Sargent Trust, if seemingly warranted by the language of 302 (d) of the Revenue Act of 1926, would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution.

There are two objections on constitutional grounds to the application of the provisions of Section 302 (d) to the Sargent Trust, should those provisions be construed as requiring the inclusion of the value of the trust property in Mrs. Sargent's gross estate. The first of these objections is based on the facts that Mrs. Sargent had no interest in the trust property which passed to others by reason of her death and that the conveyance in trust was not made in anticipation of death and bore no relation to her death. The second objection rests upon the fact that the provisions of 302 (d) were not enacted into

law until after Mrs. Sargent's transfer in trust had been fully completed. These two objections will be discussed in order.

(a) Congress has no power to impose an estate tax upon the estate of this decedent measured in any degree by the value of the property of the Sargent Trust, merely because she had previously transferred this property in trust and at the time of her death shared with two other trustees a power to terminate this trust.

It seems clear from *Heiner* v. *Donnan*, 285 U. S. 312, which has already been referred to, that Congress has no power to include as part of the measure of an *estate tax* the value of property previously transferred by a decedent without reservation of powers which make his transfer incomplete in substantial respects, unless the transfer has characteristics or motives behind it, as in the case of gifts in contemplation of death, which make the transfer testamentary in effect. In that case, in discussing the nature and scope of the Federal Estate Tax, the Court said, at p. 322:

> "The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect.

Milliken v. *United States*, 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn*, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death."

As further pointed out in *Heiner* v. *Donnan*, at pages 331–2, the power which Congress has to impose a gift tax upon transfers *inter vivos* does not warrant the inclusion of such gifts in a decedent's "gross estate" when they were not made in actual contemplation of death; for the value of such property, especially when taken at the date of decedent's death, constitutes no fair measure of the value for an estate tax.

In other words an estate tax cannot properly be made to include a delayed tax on completed gifts which are not testamentary in their nature.

Under the reasoning in *Heiner* v. *Donnan*, 285 U. S. 312, the fact that Mrs. Sargent at the time of her death was one of the three trustees who had a power to terminate the trust which she had created by gift eleven years before her death, is not a sufficient reason for including the value of the trust property in her gross estate for the purpose of measuring her estate tax. The property was not hers at the time of her death and no interest passed from her to others at or by reason of her death or by reason of any act of hers in anticipation of, or otherwise referable to, the event of her death. The power did not represent an interest retained by her in the trust property. It was not personal to her but was attached to the office of trustee, and was shared by two other trustees, one of whom was a principal beneficiary and the other a person of independent judgment who was unwilling to join in exercising it without consent of all of Mrs. Sargent's

children. She shared in the power only so long as she was trustee; and the power did not terminate at her death but continued in whoever should be trustees. Under these circumstances it seems impossible to find in this power any reasonable justification for using the value of the trust property as part of the measure of the tax imposed upon the passing of Mrs. Sargent's property at death.

(b) Congress has no power to tax Mrs. Sargent's transfer in trust by legislation enacted after the transfer was completed.

If it could be found that the power in the case at bar falls within the scope of Section 302 (d) and that it lies within the constitutional power of Congress to include in that section a *prospective* transfer in trust having all the features of the Sargent Trust, nevertheless that section must fail in its application to Mrs. Sargent's transfer because that transfer *was completed* before the provisions now found in 302 (d) or any similar provisions were enacted. Such provisions were first enacted as Section 302 (d) of the Revenue Act of 1924.

It is familiar law that Congress has no power to tax the exercise of a privilege by legislation enacted after the privilege has been fully exercised.

Nichols v. *Coolidge*, 274 U. S. 531.
Untermeyer v. *Anderson*, 276 U. S. 440.
Coolidge v. *Long*, 282 U. S. 582.
Blodgett v. *Holden*, 275 U. S. 142.

In *Nichols* v. *Coolidge*, 274 U. S. 531, affirming *Coolidge* v. *Nichols*, 4 Fed. (2d) 112, (Mass. Dist.) it was held that in so far as the Revenue Act of 1919 purported to impose an estate tax with respect to transfers completed prior to the enactment of the federal estate tax law, it was uncon-

situtional under the due process clause of the Fifth Amendment. In that case the value of the property transferred had been included in the value of the gross estate of the transferor for the purpose of computing the estate tax under the provisions of 402 (c) of the Act of 1919. The government claimed that it was properly so included since the transfer when made was intended to take effect in possession and enjoyment at or after the transferor's death. The conclusion of this Court is stated in the final paragraph of the opinion, as follows:

> "And we must conclude that § 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Blodgett* v. *Holden*, 275 U. S. 142, it was held that the provisions of the Revenue Act of 1924, Secs. 319–324, imposing a tax upon gifts were unconstitutional in so far as they purported to tax gifts which were complete prior to the passage of the act.

In *Untermeyer* v. *Anderson*, 276 U. S. 440, a similar result was reached, when the gift took place while the bill which imposed the gift tax of 1924 was before the conference committee of the House and Senate and only three days before it finally passed both Houses.

In *Coolidge* v. *Long*, 282 U. S. 582, the question before this Court was the validity of provisions of the Massachusetts inheritance tax law as applied to a transfer which the Supreme Court of Massachusetts had held to have been intended to take effect in possession and enjoyment at or after death, within the meaning of a statute passed after the gift had been consummated.

It was held that in so far as this statute purported to tax a transfer consummated before its passage, it was in violation of the due process clause of the Fourteenth Amendment. In the course of the opinion at page 599 it was said:

> "No act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."

On the principle of the cited cases the provisions of Section 302 (d) cannot be applied to tax Mrs. Sargent's transfer, made in 1919, or to measure her estate tax by the value of the trust property unless that transfer remained incomplete up to the time of her death. It has already appeared in preceding portions of this argument that the power to terminate the trust, even if construed as a power to revoke, did not leave the transfer incomplete. (See this brief, pp. 11-18.) As was stated in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 346, with respect to a power reserved by a settlor which could be exercised in four of the trusts by the settlor and the single beneficiary of each of the trusts and in the fifth trust by the settlor and a majority of the beneficiaries:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute."

The same result was reached in *McCormick* v. *Burnet*, 283 U. S. 784, where the settlor had the power to terminate the trust in whole or in part with the consent of one or more of her three children, who were life beneficiaries.

This Court has consistently recognized the rule laid down in *Reinecke* v. *Northern Trust Co.* that where the power to alter or revoke a trust is dependent on the consent of a beneficiary, the trust has passed completely from the control of the settlor.

See *Coolidge* v. *Long*, 282 U. S. 582, 628.
Porter v. *Commissioner*, 288 U. S. 436, 442.
Reinecke v. *Smith*, 289 U. S. 172, 176.

In *Porter* v. *Commissioner*, 288 U. S. 436, which is relied upon by the petitioner the power to alter or modify the trust indenture differed from the powers in the case at bar and in the cited cases in that the settlor *alone* had the power to alter or amend without concurrence or consent of any beneficiary. In the course of the opinion this Court, at page 442, expressly distinguished the trust then under consideration from the trusts held in *Reinecke* v. *Northern Trust Co.* to have been non-taxable, saying as to those trusts:

> "As title was put beyond his" (the settlor's) "control we held these transfers not taxable."

After stating that Section 302 (d) of the Revenue Act of 1926, cannot be limited by construction to include only such powers as enable the settlor to *repossess himself* of valuable interests in the property, the opinion in the *Porter* case went on to state at page 443, as the reason for the proper application of 302 (d) to the case then before it:

> "Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of

> others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable."

Answering the argument that the application of (d) to the case then before the Court would be confiscatory because it would measure the decedent's tax by property belonging to others and would tax gifts *inter vivos* that were fully consummated prior to the enactment of subdivision (d), the Court said at page 444:

> "But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living."

From the above quoted extracts it is clear that the constitutionality of the tax in the *Porter* case was sustained because the power in that case *left the settlor dominant* up to the time of his death with respect to the rights of those beneficially interested in the property. This feature of control, which, as the Court pointed out, distinguished that case from *Reinecke* v. *Northern Trust Co.*, also distinguishes the *Porter* case from the case at bar.

IV. There is no basis for including a part of the trust property in the gross estate.

The petitioner claims that it is possible to separate the adverse interest of Arthur H. Sargent in the trust from the interests given to the other two children, and to include the value of such remaining interests in the gross estate (Petitioner's brief, p. 9). In the present case Arthur H. Sargent had an undivided interest in the in-

come from the beginning of the trust until after the death of the decedent and a right to appoint an undivided interest (one-third) in the capital. The termination of the trust as to any portion of the trust property would therefore have diminished the value of his interest. Accordingly he had a direct personal interest adverse to any partial termination of the trust. The case at bar is entirely unlike *Lit* v. *Commissioner*, 72 F. (2d) 551, in which the decedent and one of the persons beneficially entitled under the trust had a power which they could exercise jointly to *alter* or *amend* the trust under which they could have destroyed the interests of other beneficiaries without affecting the interest of the beneficiary who was one of the donees of the power. The Sargent Trust contained no power to alter or amend.

In the *Lit* case the transfer in trust was made in 1927. The income from the trust was payable to the wife of the settlor for life and to the settlor after her death, if he survived her, and on the death of the survivor of both, the capital was to be transferred to their son or his appointees. The trust instrument provided that it might be "revoked or amended" by an instrument executed by the settlor and his wife. The decision of the Board of Tax Appeals (28 B.T.A. 853), which was adopted by the Circuit Court of Appeals, recognized the applicability and binding force of *Reinecke* v. *Northern Trust Co.*, but decided that, although the interest of the wife could not be included in the gross estate, the interest of the remainder-man might be, as the settlor and his wife could have destroyed the interest of the remainder-man without affecting the life interest of the wife (*Lit* v. *Commissioner*, 28 B.T.A., 853, 858–861).

In the case at bar as there was no power to alter or amend and the interest of Arthur H. Sargent was not separable, there is no basis for a claim that a part of the

trust property should be included in the gross estate. In pointing out that the *Lit* case is clearly distinguishable, no tacit admission is intended that that case was correctly decided.

It should be pointed out that the *Lit* case did not lay down any general proposition that if a trust may be terminated with the consent of some of the beneficiaries, the interests of the other beneficiaries may be included in the gross estate of the settlor. In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and *McCormick* v. *Burnet*, 283 U. S. 784 (the facts of which are reported in 43 F. (2d) 277) this Court has treated conveyances in trust which were subject to change or revocation with the assent of less than all the beneficiaries as completed transfers to the extent of the whole of the property conveyed.

CONCLUSION

For the reasons which have been stated, it is submitted that the decision of the Court below was correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 36.—October Term, 1935.

Thomas W. White, Former Collector of Internal Revenue, Petitioner,
vs.
Mary Adelaide Poor, et al., Surviving Executors.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents questions similar to those in *Helvering* v. *Helmholz*, No. 14.

In 1919 Adelaide J. Sargent conveyed property to three trustees, who were herself, Arthur H. Sargent, her son, and a third person not connected with the family. Contemporaneously the trustees executed a declaration of trust by the terms of which they were to pay one-half the net income to Mrs. Sargent during her life and the other half until her death, and after that event the whole, in equal shares, to such of her three children as should be living at the time of each payment, and to the appointees of any deceased child, and in default of appointment, to the living issue of a deceased child. The trust was to terminate upon the death of the last survivor of the settlor and her three children, and thereupon the corpus was to be divided in specified shares amongst the issue, next of kin, or appointees of the children. Each child was given a general power of appointment by will over one-third of the principal. Mrs. Sargent died January 22, 1931, leaving her three children to survive her. Her will was probated and the respondents are her executors. The declaration of trust contains a power to terminate, in these words:

"This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and

in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation."

No power was reserved by Mrs. Sargent to modify the terms of the trust, and the recited power was never exercised.

The agreement directed that if any trustee should die, resign or be unable to act, a successor should be appointed by the surviving trustees by a written instrument approved by the then living children of Mrs. Sargent. In 1920 the settlor resigned as trustee and a daughter was appointed to fill the vacancy. After serving for one year she resigned and Mrs. Sargent was appointed to fill the vacancy thus occasioned and continued as a trustee until her death. The decedent's son, who was a trustee, had a vested interest in an undivided share of the income and a power to appoint by will his share of the income and one-third of the corpus.

The Commissioner of Internal Revenue ruled that the value of the trust principal should be included in the gross estate. The respondents paid the tax under protest and filed a claim for refund, which the Commissioner rejected. They brought suit in the District Court, which held the transfer did not come within Section 302 (c) of the Revenue Act of 1926, as one made in contemplation of death, and was not taxable under Section 302 (d).[1] The court also ruled that to impose an excise tax on the transfer by a statute enacted after the transfer was complete would constitute a taking of property without due process in violation of the Fifth Amendment.

The petitioner appealed from a judgment in favor of the respondents, and the Circuit Court of Appeals affirmed, holding that the power in question was not a power to alter, amend or revoke within the meaning of Section 302 (d).[2]

As in No. 14, the declaration of trust in this case, technically speaking, contained no power to revoke, amend or alter the trust.

[1] 8 F. Supp. 995.
[2] 75 F. (2d) 35.

What the instrument did was to make it possible for the trustees acting jointly to terminate the trust at any time. The petitioner insists that as Mrs. Sargent was one of the trustees named in the declaration the power to terminate, which he views as the equivalent of a power to alter, amend or revoke, was, strictly speaking, lodged in the settlor and two other persons. He says, therefore, that these facts make the transaction taxable under Section 302 (d). The respondents reply that if the section be strictly construed it applies only to a transfer where the enjoyment thereof is subject to a power to "alter, amend or revoke" and that the instant transfer was subject to no such power, but to a power to terminate. The circumstances about to be mentioned render it unnecessary to consider either contention.

Mrs. Sargent resigned as a trustee in 1920 and was succeeded by her daughter, one of the beneficiaries. When, a year later, the daughter resigned a new trustee could be appointed only by the written nomination of the two remaining trustees with the approval of all the beneficiaries of the trust. By such concerted action Mrs. Sargent was again appointed a trustee. She then acquired any power for the future to participate in a termination of the trust solely by virtue of the action of the other trustees and the beneficiaries and not in any sense by virtue of any power reserved to herself as settlor in the original declaration of trust. We think, therefore, that neither technically nor in substance does the power to terminate as it existed from 1921 to the date of Mrs. Sargent's death fall within Section 302 (d).

What has been said in No. 14 requires a ruling that the section, if held to apply to this transfer, offends the due process clause of the Fifth Amendment.

Judgment affirmed.

Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.